

TE TAI HARURU

Journal of Maori and
Indigenous Issues

VOLUME 4 - 2013

EDITOR - DR NIN TOMAS



THE UNIVERSITY
OF AUCKLAND

FACULTY OF LAW

Te Tai Haruru – Journal of Maori and Indigenous Issues focuses on issues of concern to Maori and Indigenous Peoples throughout the world. It is primarily a vehicle for staff and students at the Faculty of Law in Auckland, Aotearoa New Zealand, to share valuable research on indigenous issues, free of charge, with as wide a range of readers as possible. However, articles may be solicited from time to time from other academics writing on themes being covered by the Journal.

This issue compares the way domestic law impacts on indigenous peoples living in two different jurisdictions. It covers consultation rights in Aotearoa New Zealand and Canada; tax regimes in Aotearoa New Zealand and Canada; the enduring effect of Residential Schools in Australia and Canada; and, language rights in Switzerland and Canada. At the international level, it also includes a report from the Vice-Chairperson of the Working Group on Indigenous Peoples, and the Observers’ Report on the Human Rights of the Rapa Nui People on Easter Island (reprinted with authority of the Observatorio Ciudadano, Chile).

CONTENTS

COMPARATIVE INDIGENOUS ISSUES

The Duty To Consult: What Aotearoa New Zealand can Learn from Canada Sara Kate Battersby	2 - 26
Historical Development of the Tax Regimes of Maori Authorities in Aotearoa New Zealand and First Nations in Canada Audrey Sharp	27 - 53
The Unspoken Genocide: Canada’s Residential Schools and Australia’s Stolen Generation Zachary Fargher	54 - 75
Official Recognition of Indigenous and Minority Languages in Canada and Switzerland: Comparing the Romansh and Inuit Languages Bettina Meier-Wehren	76 - 98

INTERNATIONAL INDIGENOUS ISSUES

An Indigenous Voice at WIPO? Valmaine Toki	99 - 107
The Human Rights of the Rapa Nui People on Easter Island: IWGIA report 15 Clem Chartier, Alberto Chirif and Nin Tomas	111 - 149

THE DUTY TO CONSULT: WHAT AOTEAROA NEW ZEALAND CAN LEARN FROM CANADA

Sara Kate Battersby*

INTRODUCTION

In 2004 the Foreshore and Seabed Act was passed in Aotearoa New Zealand.¹ 15-20,000 New Zealanders marched in a weeklong protest against the passing of the Act. Such an unprecedented reaction raised the question: what had broken down or was missing in the consultation processes of our democratic governing system? For Maori, who were the main group affected by the legislation, the answer was simple: while the law set clear general standards for consulting with individuals, group consultation rights for Maori were ad hoc and did not adequately reflect their interests. Their collective voices were being ignored and they had only peripheral involvement in crafting the Foreshore and Seabed Act.

In comparison, over the past thirty years the Canadian courts have developed clear guidelines setting out government-indigenous peoples' consultation rights. Indigenous Canadians possess the same individual consultation rights as other Canadians under administrative law. In 2004, however, the Supreme Court went further.² It recognised that the historic principle of the *honour of the Crown* meant that the Crown³ had a legal duty to consult Aboriginal groups when making decisions that may adversely impact lands and resources they claimed.⁴ In doing so the Court gave greater certainty to government-indigenous consultation standards and provided an avenue for challenging Crown actions that do not conform to those standards.⁵

In Aotearoa New Zealand, the government's consultation processes leading up to the passing of the Foreshore and Seabed Act in 2004 and its sale of State Owned Enterprises

* Sara Kate Battersby is a solicitor at Meredith Connell in Auckland, Aotearoa New Zealand.

¹ The terms "Aotearoa" and "New Zealand" are used together to acknowledge an ongoing history in which Maori and British settlers combined into a single state after the signing of Te Tiriti o Waitangi/The Treaty of Waitangi in 1840. "New Zealand" and "Aotearoa" are used separately to indicate where one or other of the parties' interests prevails.

² *Haida Nation v British Columbia (Minister of Forests)* [2004] 2 SCR 511.

³ *Ibid*, para 16. The terms "government" and "Crown" are often used interchangeably in the political and legal arena to signify that some important government functions are exercised in the name of the "Crown" ie. by sovereign right, and upheld by law.

⁴ The legal source is section 35(1) of the Canadian Constitution Act 1982. Although section 35(1) covers Aboriginal and treaty rights, the specific peoples covered by the term "Aboriginal" remains problematic. The *Metis*, for example, do not have the same level of recognised group rights as the Nishga or the Inuit, both of which are dominant populations within historical territories that have long been recognised by the Canadian government as having independent, pre-existing, political rights. See discussion in P Chartrand (ed), *Who are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction*, Purich Publishing Ltd, Saskatoon, 2002.

⁵ This does not include non-status Indians and those who live off reserve, *Metis*, or Inuit who are not recognised members of an Inuit community. See discussion about "constitutionally protected Indians" and "Indian Act Indians" in J Giokas and R Groves, "Collective and Individual Recognition in Canada: The Indian Act Regime", in P Chartrand, *ibid*, 41-82.

into private ownership in 2013, graphically illustrate Maori dissatisfaction with those processes. This article explores the extent to which Aotearoa New Zealand can provide the same level of protection for indigenous consultation rights as exists in Canada.

The first part of the article sets out four sources of the duty to consult in Canada. Of these, the *honour of the Crown* is the most wide-ranging and robust source of the duty. This principle will be analysed to identify how it might be implemented in Aotearoa New Zealand. Triggers for the duty, content of the duty, and specific Canadian cases will be examined. The second part of the article uses the Foreshore and Seabed Act and the current sale of State Owned Enterprises, to highlight deficiencies in the consultation processes of Aotearoa New Zealand. Finally, I conclude that adopting a Canadian-type judicial approach, and recognising that the *honour of the Crown* underpins the Maori-Crown Treaty relationship, thus setting a higher standard for consultation than presently exists, would provide a clearer and fairer process for future government consultation with Maori.

ABORIGINAL CONSULTATION RIGHTS IN CANADA

Sources of the Duty to Consult

Judicial decisions concerning the duty to consult indigenous peoples in Canada are directly referable to section 35(1) of the Canadian Constitution Act 1982, which states:

The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

There are four sources of consultation rights for indigenous groups in Canada. They are: administrative law; the Crown's fiduciary relationship with its indigenous people; section 35(1) of the Canadian Constitution Act 1982; and, upholding the *honour of the Crown*.

(i) Administrative Law Procedures

The common law doctrine of procedural fairness applies to all Canadians. General consultation rights derive from the rule of natural justice known as *audi alteram partem* (hear the other side).⁶ The rule originally applied only in judicial contexts, but with the development of modern administrative law Canadian courts began applying it to executive bodies as well.⁷ It requires the Crown to follow fair procedures and exercise reasonable discretion whenever Crown actions affect the rights of its subjects. Thus, the rule has developed into a set of principles for government consultation.⁸ In its simplest terms, the common law rule requires that if the government, or a government body,

⁶ *Iwa v Consolidated-Bathurst Packaging Ltd* [1990] 1 SCR 282.

A similar New Zealand position is set out in P Joseph, *Constitutional and Administrative Law in New Zealand*, Brookers Ltd, Wellington, 2001, 860.

⁷ A Wicks, "Beyond Audi Alterum Partem: the Duty to Consult Aboriginal Peoples in Canada and New Zealand", *Journal of South Pacific Law* (2009) 13(1) 40.

⁸ *Iwa v Consolidated-Bathurst Packaging Ltd*, n6 at 290; Joseph, n6 at 861.

wants to act in a way that will affect a person's rights, it must consult with the person whose rights will be affected.⁹

The Supreme Court in *Baker v Canada*¹⁰ set out three factors that influence whether consultation is required: first, the closer the decision is to a judicial process, the more likely it is that consultation will be required; second, the statutory context is crucial in determining whether a decision-maker is required to consult; and, finally, the greater the effect of a decision on an individual and especially on individual rights, the more likely it is that consultation will be required. Section 35(1) of the Canadian Constitution Act 1982 extends this right to indigenous groups. If, for example, an indigenous treaty interest does not amount to an existing Aboriginal or treaty right, but is being impacted upon by the Crown through a procedure involving the Crown's duty of procedural fairness, the affected group will be entitled to the benefit of the duty.¹¹

(ii) The Crown's Fiduciary Duty

The second source of consultation rights is fiduciary duty. The landmark case of *R v Guerin*¹² affirmed that the Crown has a fiduciary duty to Aboriginal peoples in Canada, and that it is *sui generis* or unique. The quality of "uniqueness" stems from an analogy being drawn with private law. If Aboriginal peoples are the undisputed beneficial owners of specific Crown-held property then the Crown owes them a "public" fiduciary duty and a constructive trust arises.¹³ The fundamental principles of a constructive trust create an obligation on the trustee not to knowingly act contrary to the best interests of its beneficiary in order to benefit another interest.¹⁴

In *Guerin* the Supreme Court of Canada used this logic to establish that infringement of existing Aboriginal rights required consultation by the Crown in order to be correctly determined. Dickson J described the fiduciary obligations of the Crown in the following manner:¹⁵

where by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct ... in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

The Crown's fiduciary duty to Aboriginal peoples applies to virtually every facet of the Crown-Native relationship.¹⁶ In *Osoyoos Indian Band v Oliver (Town)*¹⁷ the broad nature of the Crown's fiduciary duty was analysed. The case established that if the fiduciary duty conflicts with the Crown's public duty to all Canadians, the fiduciary duty is appropriately exercised if there is minimal impairment of the affected Aboriginal rights.

⁹ Ibid.

¹⁰ *Baker v Canada* [1999] 2 SCR 817, para 23.

¹¹ See discussion in T Issac and A Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 *Alta LR* 49, 53.

¹² [1984] 2 SCR. 335, 385.

¹³ Ibid.

¹⁴ Issac and Knox, n11 at 51.

¹⁵ [1984] 2 SCR. 335, 336.

¹⁶ L Sealy, "Fiduciary Relationships" [1962] *Cambridge LJ* 69, 72.

¹⁷ *Osoyoos Indian Band v Oliver (Town)* [2001] 3 SCR 746, para 4.

The Supreme Court analysed the application of section 35 of the Indian Act 1985; a provision which allows the Governor-in-Council to make use of reserve land for public purposes. It held that once it has been determined that the expropriation of Indian lands is in the public interest, the duty restricts Crown expropriation to the minimum interest needed to fulfill that public purpose, thus ensuring minimal impairment of the Aboriginal use and enjoyment of their lands.

Furthermore, in *Delgamuukw v British Columbia*,¹⁸ the Supreme Court stated that the fiduciary relationship between the Crown and Aboriginal people “may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands”.¹⁹ This waters down the content of the duty: the fiduciary duty “may” be satisfied as opposed to “must”, and only the “involvement” of Aboriginal peoples is sought, as opposed to any stronger decision-making rights or rights of veto.

(iii) Statutory Rights under the Canadian Constitution Act 1982

The Crown’s duty to Native peoples is entrenched in the Canadian Constitution Act 1982,²⁰ and the rights recognised and affirmed by section 35(1) now include a duty to consult.²¹

Constitutional entrenchment means that any Aboriginal rights still existing in 1982 can only be extinguished by legislation that shows a “clear and plain intention” to deny particular rights.²² Legislation that limits the exercise of Aboriginal rights will then only be valid if it meets the test justifying interference promulgated in *R v Sparrow*.²³

In *Sparrow* the first question to be asked is whether the legislation in question has the effect of interfering with an existing Aboriginal right.²⁴ The characteristics of any rights at stake must be analysed, and the Supreme Court noted that in doing so, while it is impossible to give easy definitions to various rights, it is crucial to be sensitive to the Aboriginal perspective of their meaning.²⁵ For example, *Sparrow* concerned fishing licences and restrictions on fishing. The Court emphasised that fishing rights in the Aboriginal context were not traditional property rights in the European sense, but rights held by the collective in keeping with the culture and existence of the group. It sought to avoid the outright application of traditional common law concepts of property.

The second question to be asked is whether there has been *prima facie* infringement of section 35(1) of the Canadian Constitution Act 1982. The Court will inquire whether the limitation is unreasonable, or if the regulation imposes undue hardship or denies to the holders of a right their preferred means of exercising that right.²⁶ The onus of proving a

¹⁸ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, para 14.

¹⁹ *Ibid.*

²⁰ Discussed in L Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, University of Toronto Press, Toronto, 1996, 4.

²¹ Discussed in D Newman, *The Duty to Consult*, Purich Publishing Ltd, Saskatoon, 2009, 14.

²² *R v Sparrow* [1990] 1 SCR 1075, para 37.

²³ *Ibid.*

²⁴ *Ibid.*, para 68.

²⁵ *Ibid.*

²⁶ *Ibid.*, para 70.

prima facie infringement lies on the individual or group challenging the legislation.²⁷ In *Sparrow* the Court found that regulations determining how the Musqueam caught fish were an adverse restriction on the Musqueam's right to fish for food. The Court stated that the test involved asking whether the purpose or the effect of the restriction imposed on fishing net lengths would be to unnecessarily infringe the protected fishing right. This test would be met if, for example, the Musqueam were forced to spend undue time and money per fish caught, or if the net length reduction resulted in a hardship to the Musqueam in catching fish.²⁸

If a *prima facie* interference is found, analysis moves to the issue of justification.²⁹ This test also involves two steps. First, whether there is a valid legislative objective. In *Sparrow*, the Court inquired whether Parliament's objective in authorising regulations regarding fisheries was valid. An objective aimed at preserving section 35(1) rights by conserving and managing natural resources, for example, would be valid.³⁰ If a valid legislative objective is found, analysis proceeds to the second part of the justification test: application of the principle of the *honour of the Crown* in Crown dealings with Aboriginal peoples.³¹ This is where the duty to consult is crucial. The special trust relationship and the duty to consult Aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified.³² If it is found that the Crown has not consulted with Aboriginal peoples and has not met the judicial criteria of what the duty to consult entails in a particular consultation, then the legislation will not be justified and there cannot be an interference with the Aboriginal right.³³

It is also important to note the further comment made by the Supreme Court of Canada in *R v Cote*³⁴ that section 35(1) only sets *constitutional minimums* and that governments may choose to go beyond the standard set by section 35(1).

(iv) Honour of the Crown

The last source of the duty to consult in Canada is the *honour of the Crown*. The history of this duty is important as it indicates how such a duty can also be implemented in Aotearoa New Zealand.

Long before Canada agreed on a formal Charter of Rights, it inherited the British tradition of acting honourably for the sake of the sovereign.³⁵ This is a very ancient convention with its roots in pre-Norman England and a time when every yeoman owed personal allegiance to his chieftain or king. Anyone who was charged with speaking or acting on behalf of the King bore an absolute personal responsibility to lend credit to his master's good name.³⁶ Should he fail in this responsibility, or cause embarrassment, he

²⁷ Newman, n21 at 16.

²⁸ *Sparrow*, n22 at para 70.

²⁹ *Ibid*, para 71.

³⁰ *Ibid*.

³¹ *Ibid*, para 75.

³² *Ibid*.

³³ Newman, n21 at 19.

³⁴ [1996] 3 SCR 139, 169.

³⁵ D Arnot, "The Honour of the Crown" (1996) 60 *Sask L Rev* 339, 340.

³⁶ *Ibid*.

was required to answer personally to the King with his life and fortune.³⁷ These small societies were conscious of their heritage and kinship and a single act of irresponsibility could blemish a family's name for generations.³⁸ The Crown at this time was not an abstract or imaginary essence, but a real person whose power and prestige was directly dependent on the conduct of its advisors, captains, and messengers.³⁹

With the rise of the global British Empire in the 19th Century, the personal relationship between different sovereigns and their ministers weakened. British jurists began to mold this concept; appealing to the honour of the Crown was not seen as merely an appeal to the sovereign as a person, as it was originally, but to a "traditional bedrock of principles of fundamental justice that lay beyond persons and beyond politics".⁴⁰ Thus the *honour of the Crown* in its historical light was far more than a petty idea or a principle, it became in essence the "conscience of the country".⁴¹

The Canadian Royal Proclamation of October 7, 1763, by King George III, sought to organise Great Britain's New North American Empire and to give a policy guide to stabilise relations with the North American Aboriginal peoples through regulation of trade, settlement and land purchases.⁴² One of the principles to guide the Canadian government's dealings with Aboriginal people was that the historical relationship between the government in its interactions with Aboriginal peoples held the *honour of the Crown* to be at stake.⁴³

Flowing from the *honour* principle is a duty on the Crown to consult with Aboriginal peoples when any government activity may affect Aboriginal peoples' rights and interests. This duty was elevated from a moral obligation to one that is legally enforceable in the two landmark cases of *Haida*⁴⁴ and *Taku River Tlingit First Nation v British Columbia*⁴⁵ discussed later in this article. The *honour of the Crown* obliges the Crown to respect Aboriginal rights, by identifying them through negotiation with Aboriginal peoples.⁴⁶ It also obliges the Crown to consult with Aboriginal peoples in all cases where its activities may affect rights that are asserted but not yet proven.⁴⁷ These cases go further than *Sparrow*. Instead of reaffirming the duty to consult as a mere factor to be considered under the *Sparrow* justification test, they established the duty to consult as a doctrine in its own right. Thus, in *Haida*, the Supreme Court stated that the following obligation to consult arose:⁴⁸

³⁷ Ibid, 341.

³⁸ J Hartley, "Upholding the Honour of the Crown - *Haida Nation v British Columbia* [2004] 3 SCR 511", (2005) 6(9) *Indigenous Law Bulletin* 22.

³⁹ Ibid.

⁴⁰ Arnot, n35 at 345.

⁴¹ Ibid.

⁴² W Maton (ed), "The Royal Proclamation", *The Salon Law Archive* http://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html. (accessed 30 June 2013).

⁴³ Turtle Island Native Network "Aboriginal Policy, Legal and Constitutional Framework". (accessed 30 June 2013). <http://www.turtleisland.org/news/abpolicy.pdf>.

⁴⁴ *Haida*, n2.

⁴⁵ *Taku River Tlingit First Nation v British Columbia* [2004] 3 SCR 550.

⁴⁶ B Slattery "Aboriginal Rights and the Honour of the Crown" (2005) 29 *SCRL* 433, 436.

⁴⁷ *Haida*, n2 at para 35.

⁴⁸ Ibid, para 20.

Section 35 represents a promise of rights recognition, and it is always assumed that the Crown intends to fulfil its promises. This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of section 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights. This, in turn implies a duty to consult.

Consultation was necessary in order to define Aboriginal rights.⁴⁹ The Crown claim that it could not know what rights existed before claims were resolved and therefore had no duty to consult or accommodate beforehand,⁵⁰ was rejected. While recognising that it might pose difficulties, the Court held that it is possible to reach an idea of asserted rights and their strength, sufficient to trigger an obligation to consult and accommodate, before final judicial determination or settlement.⁵¹ Consultation before final claims resolution should, therefore, occur.⁵² When the Crown has actual or constructive knowledge of the existence, or potential existence, of an Aboriginal right, and contemplates conduct that might adversely affect it, the *honour of the Crown* gives rise to a duty to consult.⁵³

Conclusion

In Canada, administrative law provides a general duty of consultation based on natural law and procedural fairness. This protection has now been extended to include claims made by indigenous groups. Imposing a fiduciary duty on the Crown provides some guidelines for consultation but focuses more on the impact of past governmental action in failing to protect rather than on the processes required to create new relationships with indigenous groups. Statutory protection of Aboriginal rights under section 35(1) of the Canadian Constitution Act 1982 is extremely important as it is the constitutional bedrock on which indigenous claims rest, and the Courts can interpret the sections in light of specific circumstances and monitor government activities that may adversely impact Aboriginal rights. However, the most wide-ranging, effective, and strongest source of the duty to consult rests on upholding the *honour of the Crown*. This principle underpins the other three sources and adds a strong legal imperative for the Crown not only to “engage” but also to “recognise” and “honour” its historical relationship with indigenous peoples.

Four Case Studies concerning the Duty to Consult in Canada

(i) Haida Nation

*Haida Nation v British Columbia (Minister of Forests)*⁵⁴ was an appeal by the Crown to the Supreme Court. In this case there was a strong *prima facie* claim to Aboriginal title. The Crown had granted a tree farm licence to a major forestry firm to harvest in forests, an activity which would, potentially, have serious impacts on Haida Nation rights and title.⁵⁵ The licence was then transferred by the Crown to various companies, despite

⁴⁹ Ibid, para 38.

⁵⁰ Ibid, para 36.

⁵¹ Ibid.

⁵² Ibid, para 33

⁵³ Ibid, para 35.

⁵⁴ *Haida*, n2.

⁵⁵ Ibid, para 15.

profuse Haida nation objections and refusal to give their consent.⁵⁶ The Crown knew of the Aboriginal rights and title and that the transfers could have a serious impact on them. The Chambers Judge had found that the Crown was under a moral, but not a legal duty to negotiate with the Haida Nation.⁵⁷ The British Columbia Court of Appeal reversed this decision, stating that the Crown had a legal obligation to consult with Aboriginal groups whose interests may be affected.⁵⁸

The Supreme Court held that the duty to consult is triggered when:⁵⁹

the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect them. The determination of such a duty depends both on the strength of the right that is being encroached upon as well as the negative impact and gravity of the government's conduct.

In order for the Crown to fulfill its duty to consult, Newman summarises the approach taken by the Supreme Court regarding the nature and content of the Crown-Indigenous relationship as follows:⁶⁰

Good consultations are about developing relationships and finding ways of living together in the encounter that history has thrust upon us. Focusing too narrowly on the legal form of the duty may contain hidden dangers to deeper forms of consultation and reconciliation. Focusing on the legal doctrine may result in a legalistic approach to a relationship that entails extensive attempts to formalise and document discussions which might well not be what best contributes to a relationship of trust.

There had been absolutely no consultation with the Haida nation.⁶¹ For this reason the Court found that the Crown had not met any of the content requirements of the duty to consult. The Court ruled that the decisions made by the Crown relating to the forestry licence consent should be reviewed in light of the necessary consultation requirements and that the Haida Nation could pursue an interlocutory injunction.⁶²

(ii) Taku River

*Taku River Tligit First Nation*⁶³ concerned a mining company, Redfern Resources Limited, which sought permission from the British Columbia government to re-open an old ore mine with deposits of copper, lead, zinc, gold, and silver. Taku River objected to the company's plan to build a road through a portion of their traditional territory. The proposed access road was 160 kilometres long. Experts reported that it would pass through an area critical to the Taku River domestic economy, adversely impact Taku River's continued ability to exercise its Aboriginal rights, and alter the landscape to which the group laid claim.⁶⁴

⁵⁶ Ibid, para 16.

⁵⁷ Ibid, para 23.

⁵⁸ Ibid, para 52.

⁵⁹ Ibid, para 35.

⁶⁰ Newman, n21 at 47.

⁶¹ Ibid, para 42.

⁶² Ibid, para 62.

⁶³ *Taku River*, n45.

⁶⁴ Ibid, para 31.

The Supreme Court held that the Province (Crown) had met its duty to consult meaningfully with the Taku River in its decision-making process for approving the project application by Redfern. In the circumstances, the content of the duty to consult extended beyond the minimal requirements of notice, disclosure, and consultation, to include what it termed a “level of responsiveness to the community’s concerns”.⁶⁵ Taku River were included as part of the Project Committee and had participated fully in the environmental review process and the consultation process under the Provincial Environmental Assessment Act. The views of Taku River were put before decision-makers, and the final project approval contained measures designed to address their immediate and long-term concerns. Thus, it was clear that the requirements of the duty to consult were met because meaningful opportunities for consultation were offered at all appropriate stages of the development of the project under consideration and the parties were able to negotiate accommodation of both parties’ interests.

(iii) *R v Douglas*

The duty to consult in Canada contains an element of shared responsibility in identifying the Aboriginal rights being claimed and their assessment. On the one hand, the Crown has an obligation to identify the relevant rights and failure to do so could result in a finding that the process of consultation is unreasonable.⁶⁶ On the other hand, once notified of government action, Aboriginal communities also have a responsibility to identify the rights they claim will be potentially affected and failure to do so may preclude the need for further consultation.⁶⁷

*R v Douglas*⁶⁸ demonstrates the reciprocity required for proper consultation. The case concerned a dispute between the Cheam First Nation and the Department of Fisheries and Oceans [DFO], over the Department’s decision to open a marine sport fishery and allow non-Aboriginal fishermen to retain early Stuart Sockeye salmon.⁶⁹ The fish are of special significance to the Cheam as they are the first run of their season and have a high-quality fat content. The Cheam argued that the Crown’s decision to open the marine sport fishery at a time when there were restrictions on the Aboriginal fishery was not in accordance with the *honour of the Crown*. It was alleged that the Crown was infringing the Cheam’s Aboriginal right to fish for food, and social and ceremonial purposes that are guaranteed under section 35(1) of the Canadian Constitution Act 1982. These actions were alleged to be in breach of the Crown duty to consult with the Cheam.

The British Columbia Court of Appeal ruled that the Crown consultation was adequate for two principal reasons. First, the Court found that the DFO had conducted appropriate consultations in developing and implementing its fishing strategy. It had conducted detailed and extensive consultation with the Cheam about Crown conservation objectives, including the provision of information and technical assistance to enable informed discussion. The DFO also provided opportunities for the Cheam to express their concerns, resourced and facilitated meetings, and made adjustments to its

⁶⁵ Ibid, para 32.

⁶⁶ *Metlakatla Indian Band v Canada (Minister of Transport)* 2007 FC 553.

⁶⁷ *R v Douglas* [2007] SCCA 352.

⁶⁸ Ibid.

⁶⁹ Ibid, para 10.

targets and exploitation rate in response to Cheam concerns.⁷⁰ In light of the above, the Court held that the DFO was not required to consult each First Nation individually on all openings and closures throughout the season, when its actions were consistent with an overall strategy that had previously been discussed with the group.⁷¹

Second, the Court found that the Cheam did not fulfill their reciprocal obligation to carry out their end of the consultation. Given this finding, to require the Crown to consult on a minor issue went beyond what is required to justify the Department's conduct.⁷² Although an unfortunate outcome for the Cheam, *Douglas* underlines the importance of the need for active participation and reciprocity in the relationship between the Crown and Aboriginal peoples.

Given the nature of the salmon fisheries, the number of Aboriginals involved, and the lack of unanimity between them on important issues, the DFO had insisted on joint consultations. Although joint consultations were an issue for the Cheam, the Court found that they were reasonable and appropriate in the circumstances. The Cheam, however, refused to participate in joint consultations, and the DFO then attempted to consult with them separately. The Cheam still failed to respond to repeated requests for meetings or to respond to major issues. They also failed to communicate their needs in concrete terms in response to DFO requests. The Court found that the Cheam "deliberately frustrated" DFO attempts to consult.⁷³ Thus, the refusal by the Cheam to meet, communicate, and attend group discussions undermined their own assertion that the consultation efforts of the government were flawed.

(iv) Ka'a'ge Tu First Nation

In *Ka'a'gee Tu First Nation v Canada*⁷⁴ the Canadian Federal Court held that the Crown had failed to discharge its duty to consult, and, if necessary, accommodate the Ka'a'Gee Tu First Nation [KTFN] when approving a recommendation for an oil and gas project in the Northwest Territories.

In this case, Paramount Resources Limited was seeking land use permits and water licences for an extension of its existing oil and gas project in the Cameron Hills area north of the Alberta Border. The KTFN were a signatory party to Treaty No. 11, which gave them treaty rights to hunt, fish and trap in the area. Further, the KTFN were one of several Aboriginal groups claiming Aboriginal title to the area, and that claim had already been accepted by the Federal and North Western Territories governments.⁷⁵ Although the Ka'a'gee Tu had participated in early consultations, there was a final stage of decision-making in which modifications were considered without any input from them.

The Court emphasised the strength of the First Nations asserted Aboriginal claim and the seriousness of the potential impact of the proposed use of the land under the oil and

⁷⁰ Ibid, para 40.

⁷¹ Ibid, para 42.

⁷² Ibid, para 45.

⁷³ Ibid.

⁷⁴ *Ka'a'gee Tu First Nation v Canada (Indian Affairs and Northern Development)* [2007] FCJ No. 1007.

⁷⁵ This land claim process was known as the "Deh Cho Process".

gas project. These factors attracted a higher duty, and necessitated formal participation throughout the entire decision-making process.

The Crown's duty was satisfied in the initial environmental review process and the First Nation benefited from formal participation. However, the Crown later decided to take advantage of the "consult-to-modify" process provided by section 130 of the Canadian Mackenzie Valley Resource Management Act.⁷⁶ Under this Act, when a Review Board issues its report and related recommendations, the responsible Ministers may agree to adopt, reject, or adopt with modifications, the recommendations, after consulting with the Review Board. In this case, the responsible Ministers met with the Review Board and substantially modified many of its recommendations concerning the KTFN.⁷⁷ During this consult-to-modify process, the KTFN were not given an opportunity to provide input into the proposed changes, nor were they allowed to participate in the meeting.⁷⁸

The Court held that the consult-to-modify process allowed the Crown to unilaterally change the outcome of what was, arguably, up until that point, a meaningful process of consultation.⁷⁹ Therefore, in respect of the new proposals, the Crown's duty to consult had not been met.

Conclusion

These important Canadian cases on the duty to consult allow the following conclusions to be drawn. First, the Crown is under a legal and not a moral duty to consult with Aboriginal peoples. Second, where a strong *prima facie* claim of potential Aboriginal rights exists and the Crown has knowledge of this, and no consultation occurs, there is a breach of the Crown duty. Third, when Aboriginal peoples are given opportunities for consultation at all the appropriate stages of a development under consideration, the requirements of the duty to consult are met. Fourth, when there has been formal participation of Aboriginal peoples for most of the process, if subsequent meetings arise that could have the potential to change the outcome or the direction of a development, and Aboriginal peoples are not included in any further discussions, the Crown will have breached its duty to consult.

All of the above are tempered by the reciprocal obligation to engage in consultation that is owed by Aboriginal peoples to the Crown. If the Court finds that the Crown has not fulfilled its duty to consult because Aboriginal groups have failed to reciprocate, the Court may find that the Crown duty has been unduly frustrated and that Crown decisions are, therefore, justified. Finally, if overarching strategies have been agreed upon during early formal consultations, and the requirements of good consultation have been met, further consultation by the Crown for later actions that are consistent with those strategies is not necessary.

⁷⁶ Department of Justice "Mackenzie Valley Resource Management Act" Department of Justice Canada <http://laws-lois.justice.gc.ca/eng/acts/M-0.2/index.html>.

⁷⁷ *Ka'a'gee Tu*, n74 at para 67.

⁷⁸ *Ibid*.

⁷⁹ *Ibid*, para 68.

Summary of the Duty to Consult in Canada

In two judgments delivered on the same day,^{80 81} the Supreme Court of Canada held that the duty to consult can arise without a proven Aboriginal or treaty right. It affirmed that the duty can be triggered where an Aboriginal right *prima facie* exists, or when it exists more generally as part of procedural fairness.

More important, however, *Haida* affirmed that the government duty to consult with Aboriginal peoples and to accommodate their interests is grounded in the principle of the *honour of the Crown*, a duty that must be interpreted “generously”.⁸² While unproven Aboriginal rights and title are not specific enough for the principle to make the Crown act as a fiduciary toward Aboriginal peoples, a generous interpretation prevents the Crown ignoring Aboriginal interests that are being seriously pursued in the process of treaty negotiations.⁸³

Haida states that the content of the duty to consult in particular circumstances is not fixed. This being so, Canadian courts use a spectrum analysis in setting the legal standard for consultation. As with any legal test that relies on multiple factors there is a great deal of space for interpretation of the specific requirements in particular instances.⁸⁴

The spectrum of the duty to consult arises from two principal factors: the strength of the Aboriginal claim, and the seriousness of the impact of contemplated government action on the interests underlying that claim. Where these two pre-conditions do not reach the threshold levels discussed earlier in this article, there is no duty to consult.⁸⁵ Furthermore, the scope of the duty can range from minimal notice requirements to a thorough duty to consult Aboriginal communities and accommodate their interests. Throughout this spectrum, each situation requires a meaningful effort by the government to act in a manner consistent with the *honour of the Crown*.⁸⁶ It requires the government to act adequately for the circumstances by providing notice of an issue and appropriate timelines for response, disclosing relevant information, engaging in meaningful discussions, responding to concerns raised in those discussions, and in appropriate circumstances, accommodating Aboriginal interests.⁸⁷

Later cases have built upon *Haida* and *Taku River*. In *Beckman v Little Salmon/Carmacks First Nations*⁸⁸ the Supreme Court considered the standard of consultation required when a treaty sets out specific requirements. The Court held that when a modern land claim treaty has been concluded, the first step is to look at its provisions and try to determine the parties’ respective obligations and whether there is some form of

⁸⁰ *Taku River*, n45.

⁸¹ *Haida*, n2.

⁸² *Ibid*, para 17.

⁸³ *Ibid*, para 27.

⁸⁴ *Ibid*, para 46.

⁸⁵ *Haida*, n2 at para 35.

⁸⁶ *Ibid*.

⁸⁷ *Taku River*, n45.

⁸⁸ [2010] 3 SCR 103.

consultation provided for in the treaty itself.⁸⁹ While consultation may be shaped by the agreement of the parties, the Crown cannot contract out of its honourable dealing with Aboriginal peoples.⁹⁰ The duty to consult is a doctrine that applies independent of the intention of the parties as expressed or implied in the treaty itself. In this light, modern treaties are protected by section 35 of the Canadian Constitution and are not to be interpreted strictly as if they were everyday contracts.⁹¹

In *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*⁹² the Supreme Court confirmed that the legislature can delegate the Crown's duty to consult to a tribunal. The mandate of the tribunal is restricted to the powers expressly or implicitly conferred on it by statute.⁹³ However, this also means that governments can set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process.⁹⁴ As already discussed, the duty to consult with Aboriginal groups is triggered when government decisions have the potential to adversely affect Aboriginal resource interests. This duty must be met. If the tribunal structure is incapable of dealing with potential adverse impacts on Aboriginal interests then the affected Aboriginal peoples must seek a court remedy.⁹⁵

Alongside the principle that the government must act consistently with the *honour of the Crown*, where the government has correctly conceived the seriousness of the claim or impact of the infringement, the decision affecting Aboriginal rights or interests will be set aside only if the government's consultation process is unreasonable. This means that perfect satisfaction for all parties in the consultation process is not required. The Canadian Federal Court of Appeal ruled in *Ahousaht Indian Band v Canada (Minister of Fisheries & Oceans)*⁹⁶ that "reasonable efforts to inform and consult would normally suffice to discharge the duty".⁹⁷ Thus while the content of the duty is informed by *honour*, review of consultation efforts in particular circumstances is limited to review for *reasonable* content.

MAORI CONSULTATION RIGHTS IN AOTEAROA NEW ZEALAND

Two examples that highlight severe deficiencies in New Zealand consultation processes and the need for a duty to consult similar to that of Canada are the Foreshore and Seabed Act 2004, and the sale of State Owned Enterprises by the New Zealand government in 2013.

(i) Consultation Process leading to the Foreshore and Seabed Act 2004

The Foreshore and Seabed Act 2004 is, arguably, the most controversial and contentious legislative act in recent New Zealand history. Nine years later its impact on Maori and

⁸⁹ Ibid, para 67.

⁹⁰ Ibid, para 69.

⁹¹ Ibid, para 102.

⁹² [2010] SCC 43.

⁹³ Ibid, para 55.

⁹⁴ Ibid, para 56.

⁹⁵ Ibid, para 63.

⁹⁶ [2008] FCA 212.

⁹⁷ Ibid, para 54.

the wider population of Aotearoa New Zealand still resonates. This debacle was brought to a head by the case of *AG v Ngati Apa*.⁹⁸ In *Ngati Apa* the New Zealand Court of Appeal held that the Maori Land Court had jurisdiction to determine customary ownership of the foreshore and seabed. In so doing the Court overruled the case of *Re 90 Mile Beach*⁹⁹ and over one hundred years of precedent holding that the English common law automatically displaced customary property ownership in New Zealand.

Five days after the judgment, the government announced that it would pass legislation certifying Crown ownership of the foreshore and seabed.¹⁰⁰ This legislation would substantially impact Maori interests in areas where customary rights still had to be quantified. The government had no binding guidelines for consulting with Maori prior to implementing such contentious national legislation: instead it employed an ad hoc approach which invited conflict between Maori and other New Zealanders.¹⁰¹ The government advocated the purpose of the proposed legislation as being “to protect access rights to the Foreshore and Seabed for all New Zealanders and to ensure customary rights were protected where those rights can be established”.¹⁰² Emphasising the principle of access for all, over Maori customary rights, actively encouraged conflict between Maori and Pakeha by pitting recreational interests against property rights that had yet to be investigated.

The New Zealand community was asked for its input. The government scheduled eleven public meetings in September 2003, in which an estimated three thousand Maori participated.¹⁰³ Members of Parliament held additional meetings in their individual electorates and public submissions were also invited.¹⁰⁴ In an effort to gain a unified position amongst Maori, many independent hui were organised by hapu and iwi. A major early meeting of national Maori leaders produced the Paeroa Declaration.¹⁰⁵ This Declaration upheld the Maori understanding of the foreshore and seabed as being Maori customary property. It further held that, as its customary owners, Maori had the right to approve any government proposals within the area. However, while Maori asserted their right to be heard early in the process, and hui continued to take place outside of the formal system, there was no adequate method of officially transmitting the outcomes of these meetings to the Crown.¹⁰⁶

Maori who participated in the government consultation found they risked not being heard. The *Full Report on the Analysis of Submissions* records that the government’s first

⁹⁸ [2003] 3 NZLR 643.

⁹⁹ *Re Ninety Mile Beach* [1963] NZLR 461.

¹⁰⁰ A Young “Quick move blocks Maori Bid to claim rights over Seabed” *New Zealand Herald*, 24 June 2003 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3509037.

¹⁰¹ T Toweill, *Maori Consultation under New Zealand Law*, LLM Thesis, University of Auckland, 2009, 49.

¹⁰² New Zealand Government “Extensive Consultation on Foreshore Proposal” The Official Website for the New Zealand Government <http://www.beehive.govt.nz/node/17835>.

¹⁰³ New Zealand Government “The Foreshore and Seabed of New Zealand - Full Report on the Analysis of Submissions” The Official Website for the New Zealand Government <http://www.beehive.govt.nz/foreshore/report/foreshore-seabed-report-full.pdf> [*Full Report on the Analysis of Submissions*].

¹⁰⁴ Toweill, n101 at 50.

¹⁰⁵ Tino Rangatiratanga “Te Takutai Moana” Kaupapa Maori http://www.kaupapaMaori.com/assets/iri/takutai_publicationv2.pdf.

¹⁰⁶ Toweill, n101 at 51.

proposal highlighted that the “purpose of the consultation was not a referendum”.¹⁰⁷ Instead it advocated the government position behind the legislation as its purpose. This suggests that the government only intended to act on public opinion if it agreed with its proposed course of action.¹⁰⁸

The government was also extensively criticised for failing to provide adequate information and for its brief consultation timeframe.¹⁰⁹ Many Maori took issue with the discussion document failing to represent Maori concepts in terms they recognised.¹¹⁰ Maori respondents said the discussion document was couched in terms of rights that are recognised in common law, rather than according to tikanga Maori.¹¹¹ Of grave concern was that only six weeks was allowed for submissions.¹¹² The control of the foreshore and seabed raised complex issues concerning customary rights and involved concepts about which the average New Zealander would need more than six weeks to mentally process, consider, and make an informed decision. Arguably, six months to one year would have provided a much better time period for reflection.

The objections recorded in the *Analysis of Submissions* are evidence of an inadequate consultation process. Despite this, the government proceeded to issue a framework for upcoming legislation in December 2003. Although the framework was intended to take into account the written submissions and public discussions that occurred throughout the consultation process,¹¹³ no significant changes were made between the first proposal of the Foreshore and Seabed Policy in August 2003 and the framework implemented in December, four months later.¹¹⁴

The Foreshore and Seabed Bill was introduced to Parliament four days after the Waitangi Tribunal Report on the Foreshore and Seabed Policy was submitted to parliament. Alarming, 94 percent of the 3946 submissions received by the Parliamentary Select Committee opposed the Bill.¹¹⁵ This level of objection made virtually no impact on the substance of the Bill. After only three days before parliament, the Foreshore and Seabed Bill became Law.^{116 117}

¹⁰⁷ *Full Report on the Analysis of Submissions*, n103 at para 1.2.1.

¹⁰⁸ Toweill, n101 at 51.

¹⁰⁹ *Full Report on the Analysis of Submissions*, n103 at para 2.2.2.

¹¹⁰ *Ibid*, para 2.2.2.

¹¹¹ *Ibid*, para 2.2.1.

¹¹² *Ibid*, para 2.2.2.

¹¹³ *Full Report on the Analysis of Submissions*, n103.

¹¹⁴ Waitangi Tribunal “Report on the Crown’s Foreshore and Seabed Policy” Official site for the Waitangi Tribunal <http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/1071/00AEFB80-5FE0-4D2E-AD9E-0F45E36B91AE.pdf> at 2.

¹¹⁵ *Full Report on the Analysis of Submissions*, n103 at 12.

¹¹⁶ Foreshore and Seabed Act 2004.

¹¹⁷ The Marine and Coastal Area Act 2011 repeals the Foreshore and Seabed Act 2004. Following an agreement between the National Party and the Maori Party in November 2008, an independent Ministerial Review Panel undertook a nationwide consultation process in the first half of 2009 and concluded that the Foreshore and Seabed Act 2004 failed to balance the interests of all New Zealanders in the foreshore and seabed, and was discriminatory and unfair. In March 2010, the government released a consultation document outlining its preferred solution. The Attorney General consulted widely on this document, with consultation processes extending over eighteen months. They included twenty hui and public meetings with representatives of business, recreational, conservation and iwi groups. Although the consultation process has improved, clear statutory requirements as to the content of consultation, and consequences if they are not followed through, is still necessary to ensure that both parties understand

(ii) State Owned Enterprises Sales

The government also plans to sell several State Owned Enterprises [SOEs], including Genesis Energy, Meridian Energy, Mighty River Power and Solid Energy. Under new legislation the New Zealand government will retain at least 51 percent ownership, with individual shareholdings being limited to 10 percent.¹¹⁸ The issue for Maori was whether a Treaty of Waitangi¹¹⁹ clause in the New Zealand State Owned Enterprises Act 1986 extended to new legislation covering partial state asset sales, and the lack of consultation with Maori in making that decision.¹²⁰

Section 9 of the State Owned Enterprises Act 1986 states:

Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

The section was drafted during the 1980s, when, as part of various reforms taking place in the public sector, State Owned Enterprises were set up to improve efficiency in government trading operations such as postal services, telecommunications, railways, electricity and broadcasting. Maori were wary of the possibility of the business assets of these SOEs being sold into private ownership before Maori claims under the Treaty of Waitangi, to resources currently held by the Crown, had been taken into consideration.¹²¹ In order to show Maori that the government would act in accordance with the Treaty of Waitangi, the Labour government inserted section 9, which guarantees that Crown actions to privatise the nation's assets will not prejudice Maori rights under the Treaty.¹²² While the Crown thought this would be adequate protection for Maori, Maori sought further clarification from the Courts.

In what came to be known as the "*Lands case*",¹²³ the New Zealand courts tested the Crown's actions against the principles of the Treaty for the first time in New Zealand's history. The Court of Appeal found that the Crown's intended transfer of assets, which involved the ownership of some 37 percent of New Zealand's total land area, did not accord with the principles of the Treaty of Waitangi.¹²⁴ The Court of Appeal went on to articulate the principles of the Treaty which the Crown needed to uphold in carrying out the business of devolving assets to SOEs. Although the process would not prevent sales, it would ensure that Maori interests were protected.¹²⁵

what is expected of them in order to reach decisions that are beneficial to both sides. See C Finlayson, "Marine and Coastal Area (Takutai Moana) Bill passes second reading", The Official Website of the New Zealand Government <http://www.beehive.govt.nz/release/marine-and-coastal-area-takutai-moana-bill-passes-second-reading>.

¹¹⁸ The Treasury "Mixed Ownership Model Consultation with Maori" (3 May 2012) The New Zealand Treasury <http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/mom-cons-slides.pdf>.

¹¹⁹ The Treaty of Waitangi is also referred to as the "Treaty" in New Zealand and this paper.

¹²⁰ "Maori consultation paper for state asset law change released" (4 May 2012) New Zealand Herald http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10782758.

¹²¹ M Chen, *Public Law Tool Box: Solving Problems with Government*, LexisNexis, Wellington, 2012, 106.

¹²² *Ibid*, 107.

¹²³ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

¹²⁴ *Ibid*, 716.

¹²⁵ Chen, n121 at 107.

The proposed sale of SOEs in 2013, and the legislation necessary to facilitate these sales, shows why it is important to Maori that the wording of section 9 of the State Owned Enterprises Act 1986 be retained. As the Leader of the Maori Party, Dr Pita Sharples has stated: "Unless the Treaty clause is kept in there to protect and keep that interest there, then we are going to be up the lake without a paddle".¹²⁶ The New Zealand government was confident that there would be adequate consultation. The current New Zealand Prime Minister, John Key, stated at the start of the consultation process: "This is a consultation process, it starts today. Like all negotiations and discussions there'll be an end point to it but I'd be surprised if that end point was one that ends in tears".¹²⁷

In late January 2012, the New Zealand government announced that a series of hui would be held in early February to consult with Maori on legislative changes necessary before a minority shareholding in four State Owned Enterprises to New Zealanders was floated: that is, before the partial sale of state-owned assets began. It also announced that a formal written submission process would be undertaken in February. This consultation process, however, would not be an opportunity to stop partial sales from proceeding. The government had already decided to proceed with the partial sales and would not deviate from its decision. The consultation process was to allow interested parties to have a say on *how* the partial sales proceeded, and the legislative safeguards needed to ensure that Maori interests were best preserved.¹²⁸ Finance Minister, Bill English, stated at the beginning of the consultation process: "We promised to talk with iwi when we originally announced plans to partially sell the four energy companies and Air New Zealand last year. ... We want to understand Maori views before we take final decisions".¹²⁹

A formal report on this consultation process has yet to be released. However, some initial observations can be made. First, regarding the consultation time-line. The consultation document and information on how to make written submissions were made available to the public on 1 February, 2012.¹³⁰ The deadline for receipt of submissions was 5pm, on 22 February, 2012. Twenty-one days to make a submission is too short a timeframe for allowing responses to the wide-ranging effect these sales could have on Maori interests.¹³¹

Second, Mr English's comments that the aim of consultation was merely "to talk" with Maori and to "understand their view points". Given the potentially serious impact this legislation could have on Maori interests and the uncertainty at the time surrounding

¹²⁶ C Trevett, "Key fails to appease Maori party" New Zealand Herald, 1 February 2012, http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10782577.

¹²⁷ Maori consultation paper for state asset law change released" New Zealand Herald, 1 February 2012 http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10782758.

¹²⁸ J Hitchcock, "Government Consultation on Partial Sale of SOE's" *Maori Law and Politics* <http://roiaMaori.wordpress.com/2012/01/27/government-consultation-on-partial-sale-of-soes/>.

¹²⁹ W English, "Iwi consultation for partial SOE share floats" The Official Website of the New Zealand Government <http://www.beehive.govt.nz/release/iwi-consultation-partial-soe-share-floats>.

¹³⁰ The New Zealand Treasury, "Mixed Ownership Model Consultation with Maori", <http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/mom-cons-slides.pdf>.

¹³¹ J Ruru, "Indigenous Restitution in Settling Waters Claims, the Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand", 22 *Pac Rim L & Pol'y J*, 311.

whether the Treaty of Waitangi clause was going to be included, it is arguable that this would have an adverse impact on Maori Interests. Instead of “talking” with Maori, the government should have been engaging in meaningful discussion, responding to concerns raised in those discussions and, in appropriate circumstances, accommodating Maori interests. These actions would have led to good consultation rather than merely information-sharing.

Third, the government’s claim that any consultation with Maori would not affect the sales going ahead as planned is worrisome. Given the seriousness of the potential impact of these sales if the Treaty of Waitangi clause was not included, and Maori claims to holding interests in the assets, the government should have formally involved Maori in each stage of the decision-making process. Not only would this involvement amount to good consultation, it would have the effect of strengthening the Crown-Maori relationship.

In *New Zealand Maori Council v Attorney-General*¹³² a Supreme Court case concerning the restructuring of the Crown's ownership of SOEs, the New Zealand Maori Council argued that the Crown was acting inconsistently with the principles of the Treaty of Waitangi. As part of this claim, it was contended that the consultation undertaken by the Crown with Maori in relation to the share sale of Mighty River Power Limited was inconsistent with the principles of the Treaty of Waitangi. However, the Supreme Court found that the consultation was not inadequate, stating the consultation was rushed but in accordance with the Waitangi Tribunal's recommendation which took account of the urgency with which the government needed to implement the privatisation.¹³³ It was also argued that the scope of the consultations was too narrow.¹³⁴ Again the Supreme Court found the scope was adequate as it was in accordance with the Waitangi Tribunal's recommendation which indicated that narrower consultation would suffice to meet its recommendation.¹³⁵ This finding of the Supreme Court of New Zealand is troublesome because it attempts to shift the blame for a flawed process on to the Waitangi Tribunal. The Crown, by way of the principle of “good faith” under the Treaty of Waitangi, should take responsibility to make sure that the consultation is adequate and meaningful, regardless of the Waitangi Tribunal's recommendations.

Conclusion

Both of these case studies, and the subordinate position of the Courts to Parliament in Aotearoa New Zealand, highlight the disparity between New Zealand and Canadian government consultation processes. In Aotearoa New Zealand the lack of consultation guidelines has produced frustration and lack of confidence in the government. Justice Baragwanath, in the New Zealand Court of Appeal, has noted that failure to provide such an opportunity leads to “feelings of unfairness, dashed hopes and risks of error”.¹³⁶ Implementing a duty akin to Canada’s duty would significantly increase the chances of Maori being adequately consulted on issues that affect them.

¹³² *New Zealand Maori Council v Attorney-General* [2013] NZSC 6.

¹³³ *Ibid*, para 83.

¹³⁴ *Ibid*, para 84.

¹³⁵ *Ibid*.

¹³⁶ *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72.

Sources of the Duty to Consult in Aotearoa New Zealand

Three legal grounds exist for implementing a duty to consult in Aotearoa New Zealand. They are administrative law; government's fiduciary duty; and the principles of the Treaty of Waitangi.

(i) Administrative Law

The legal principles for general rights of consultation in New Zealand and Canada are very similar.¹³⁷ In both countries these principles derive from the natural law rule of "audi alteram partem". In its simplest terms, the rule requires the government to consult anyone whose existing rights will be affected by its contemplated actions.

There has been much judicial commentary in New Zealand on the content of general consultation rights. In *Wellington International Airport v Air New Zealand*¹³⁸ the New Zealand Court of Appeal, endorsing the judgment of *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 111 held that consultation required:¹³⁹

the statement of a proposal not yet fully decided upon, listening to what others have to say, considering their responses and then deciding what will be done," [and that] "consultation must allow sufficient time, and a genuine effort must be made. It is a reality not a charade. ... Consultation is an intermediate situation involving meaningful discussion.

The Court of Appeal further stated that:¹⁴⁰

there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.

It appears that the content requirement for general consultation rights in New Zealand is quite strong for individuals. However the issue that arises for Maori, as a collective, is when these general consultation rights can be triggered by hapu and iwi.

A statute may require a decision-maker to consult.¹⁴¹ Where a statute is silent, the common law may impose a duty to consult depending on the power being exercised by the decision-maker and the nature of the decision.¹⁴² As held in *Baker v Canada*,¹⁴³ the closer the decision is to a judicial process, the more likely it will be that consultation will be required. A second point highlighted by the Canadian Court was that statutory context is of the utmost importance in determining whether a decision-maker is

¹³⁷ Wicks, n7 at 41.

¹³⁸ [1993] 1 NZLR 671.

¹³⁹ *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671, 675.

¹⁴⁰ *Ibid.*

¹⁴¹ Joseph, n6 at 956.

¹⁴² *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 144.

¹⁴³ [1999] 2 SCR 817, para 23, citing *Knight v Indian Head School Division No. 19* [1990] 1 SCR 653, 683.

required to consult. Finally, the Canadian Court held that the greater the effect on the individual and individual rights, the more likely it is that consultation will be required.

In the absence of statutory protection, these criteria show a clear imbalance between procedural and substantive justice. Natural resources are the subject of most decisions that impact Maori.¹⁴⁴ Decisions regarding natural resources have a high policy content and are generally considered to be closer to political rather than judicial decision-making.¹⁴⁵ This reduces the applicability of the *Baker* factors and, therefore, the general requirement for consultation.

Aboriginal rights are about collective group rights. They do not easily fit within the *Baker* requirement that “the greater the effect on the individual and individual rights, the more likely it is that consultation will be required”.¹⁴⁶ This has led to debate over whether Maori group rights should attract the same degree of protection as individual rights.¹⁴⁷ According to one commentator, Maori have great difficulty asserting consultation rights under this administrative law schema.¹⁴⁸

(ii) The Crown’s Fiduciary Duty

Another mechanism by which stronger consultation rights are implemented in Canada is by way of upholding the fiduciary relationship of the Canadian Crown with its Aboriginal peoples.

While this could have been a viable means of implementing the duty to consult in New Zealand, in 2009 the New Zealand Court of Appeal rejected a submission that Maori could make claims based on fiduciary duties. In *NZ Maori Council v AG*,¹⁴⁹ it was argued by the New Zealand Maori Council that the transfer of Crown forest land under a deed of settlement for historical breaches of the Treaty of Waitangi to Te Arawa iwi and hapu was inconsistent with the fiduciary duty of the Crown. O’Regan J stated that the law of fiduciaries informs the relationship between Maori and the Crown under the Treaty of Waitangi. That relationship is based on good faith, reasonableness, trust, openness and consultation.¹⁵⁰ However, it does so by analogy and not by direct application.¹⁵¹

O’Regan J emphasised the difficulty of placing the duty of a fiduciary upon the Crown when, in addition to its duty to Maori under the Treaty of Waitangi, it also has a duty to the population as a whole.¹⁵² Although acknowledging that in Canada the fiduciary concept is used in a direct rather than an analogous form to describe the Crown-Aboriginal relationship, he refused to traverse arguments based on the Canadian situation as “those decisions reflect the different and statutory constitutional context in Canada”.¹⁵³

¹⁴⁴ Wicks, n7 at 42.

¹⁴⁵ *Ibid*, 42.

¹⁴⁶ *Ibid*, 43.

¹⁴⁷ See M Durie "The Treaty of Waitangi, Equality of Citizenship and Indigeneity", Te Mata o te Tau Academy for Maori Research and Scholarship, Massey University, 2003.

¹⁴⁸ Wicks, n7 at 42.

¹⁴⁹ *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318, para 71.

¹⁵⁰ *Ibid*, para 81.

¹⁵¹ *Ibid*, para 81.

¹⁵² *Ibid*.

¹⁵³ *Ibid*.

In *Paki v Attorney-General*,¹⁵⁴ Hammond J, also in the Court of Appeal, expressed reluctance to employ the fiduciary concept to the Crown-Maori relationship as “it carries with it a substantial amount of legal baggage”.¹⁵⁵ Hammond J acknowledged that courts have traditionally restricted fiduciary duties to historically well-established categories or relationships that are based on special facts.¹⁵⁶ Once a particular relationship is “pigeon holed” as a fiduciary one, remedies are largely dictated by its categorisation.¹⁵⁷ By categorising the Crown–Maori relationship in this way, a fiduciary standard would impose an obligation on the Crown to act with “real selflessness” vis-a-vis a disadvantaged party, ie Maori.¹⁵⁸ This was at odds with the Treaty of Waitangi in that resort to fiduciary principles carried the unfortunate and erroneous affirmation of the inferior position of Maori.¹⁵⁹

The findings of the New Zealand Court of Appeal in the above two cases overlooks the common legal heritage shared by Canada and New Zealand, and the traditional practice of adopting and adapting case law by analogy between common law jurisdictions. Canada has successfully avoided the Crown’s duty to its Aboriginal peoples conflicting with its duty to the rest of the Canadian public by implementing the duty for minimal impairment of affected Aboriginal interests. This standard could be implemented in New Zealand. The idea that somehow this would place Maori in a subordinate Treaty position belies the fact that Maori *are* in a subordinate position to the government in political decision-making and to the courts in judicial decision-making.

It appears that New Zealand courts are reluctant to adopt the fiduciary relationship as a fully enforceable legal basis for government liability. Therefore, claims for consultation rights based on this line of authority are unlikely to succeed.

(iii) Principles of the Treaty of Waitangi and the *Honour of the Crown*

In Aotearoa New Zealand the principle of the *honour of the Crown* could be enforced either as an independent principle or used to reinforce the principles of the Treaty of Waitangi. The Treaty of Waitangi was signed in 1840 and is New Zealand’s founding document. Article 2 of the Treaty of Waitangi guarantees that the Crown will protect Maori customary rights. It states:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forest Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession:

These rights are far more specifically stated than those set out in section 35(1) of the Canadian Constitution Act, which provides simply that “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed”.

¹⁵⁴ [2009] NZCA 584.

¹⁵⁵ Ibid, para 102.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, para 81.

¹⁵⁸ Ibid, para 103.

¹⁵⁹ Ibid.

Many Maori believe that the Treaty of Waitangi should have constitutional force. However, unlike section 35(1) of the Canadian Constitution Act, in New Zealand the orthodox view of the Treaty of Waitangi is that it has no legal effect until it has been incorporated into New Zealand domestic law.¹⁶⁰

Differences in the Maori and English texts of the Treaty of Waitangi make it difficult to reconcile an English-based legal interpretation with Maori customary law. For this reason, obligations that have been derived and enforced under the Treaty of Waitangi have often been incorporated by reference to the principles of the Treaty of Waitangi.¹⁶¹ The Privy Council in *New Zealand Maori Council v Attorney-General*¹⁶² held that the principles of the Treaty of Waitangi are the “underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole”.

The principles of the Treaty of Waitangi can be given legal effect in two ways: first they can be incorporated into statutes. For example, the New Zealand Resource Management Act 1991 [RMA] provides in section 8 that all persons exercising functions and powers under the RMA are required to “take into account the principles of the Treaty of Waitangi”. This includes duties to act reasonably and in good faith and to actively protect Maori interests.¹⁶³ The other way Treaty principles can be given legal effect is that they may be relevant to interpreting legislative provisions or statutory discretions.¹⁶⁴ Maori rights would be strengthened considerably if the principles of the Treaty included a duty to consult.

Case law on consultation as a Treaty principle is inconsistent. In the 1987 *Lands case*, the Court of Appeal rejected the submission that consultation was a Treaty principle. The judges claimed such a principle would be “elusive and unworkable”.¹⁶⁵ However, Richardson J did accept that other Treaty principles such as “good faith” and “partnership” may sometimes require consultation. This position has been followed by the Waitangi Tribunal and the lower courts.

A conflicting line of authority is established by the Court of Appeal in the 1989 case, *New Zealand Maori Council v Attorney-General [Forests Case]*.¹⁶⁶ In the *Forests Case* the Court held that: “it is right to say the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues”. This standard was implemented by the Planning Tribunal in *Gill v Rotorua District Council*,¹⁶⁷ a case concerning an appeal pursuant to the RMA against the Rotorua District Council's decision allowing consent to develop eleven residential dwellings on the shores of Lake Tarawera, in Rotorua. Judge Kenderdine held that: “one of these principles is that of consultation with tangata whenua”. The requirement was also affirmed by the High

¹⁶⁰ Wicks, n7 at 43.

¹⁶¹ Joseph, n6 at 67.

¹⁶² *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 516.

¹⁶³ *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa Ki Kawerau* [2003] 2 NZLR 349, para 55.

¹⁶⁴ *Huakina Development Trust v Waikato Valley Authority & Bowater* [1987] 2 NZLR 188.

¹⁶⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. [*Lands Case*]

¹⁶⁶ [1989] 2 NZLR 142.

¹⁶⁷ [1993] 2 NZRMA 604, 616.

Court in *Quarantine Waste (NZ) Ltd v Waste Resources Ltd*,¹⁶⁸ a case concerning an application for judicial review of the consent given by Manukau City Council to authorise incineration of waste under the RMA. One of the issues for consideration was whether sections 6 and 8 of the RMA had been breached. Section 6 relates to the recognition and protection of Maori culture, traditions and customary rights; section 8 provides that when any powers or functions are exercised under the RMA, the principles of the Treaty of Waitangi must be taken into account. In deciding whether these sections had been breached, the High Court referred to the necessity for consultation. While the Court found that there had been no breach of the duty to consult Maori, the case clearly links the duty to the principles of the Treaty of Waitangi.

These cases raise a single point: what constitutes a “major issue”? As Wicks argues: “It is the uncertainty inherent in that concept that has allowed some lower courts to leave the law fairly unsettled in this area”.¹⁶⁹ Underlying this ambivalence is the New Zealand court’s duty not to unduly hinder government processes, while also providing legal protection to indigenous groups impacted by government actions in a way that other New Zealanders are not. This is the dilemma the Canadian courts have actively sought to overcome by extending the rules of procedural fairness to include indigenous groups, adapting the fiduciary relationship by analogy and giving a generous interpretation to treaty rights. Throughout the Canadian cases they have relied on the principle of the *honour of the Crown* to constrain government actions and prevent the trampling of indigenous rights, while also insisting that those groups reciprocate by participating fully in negotiations.

(iv) Implementing Consultation as a Treaty principle based upon *the Honour of the Crown*

Consultation could be implemented in Aotearoa New Zealand as a Treaty principle that is based upon upholding the *honour of the Crown*. The concern of the Court of Appeal in the *Lands case*¹⁷⁰ that consultation would be elusive and unworkable is not reflected in the Canadian experience. The criteria for implementing a duty to consult Maori are no less uncertain than the criteria set out for general consultation rights under administrative law in Canada. As highlighted earlier, general consultation rights are context specific: they vary according to the nature of the decision, the decision-maker, and the statute. Furthermore, the duty to consult Aboriginal peoples set out in *Haida* and *Taku River*, is triggered by the presence of actual or constructive knowledge. This acknowledges the superior position of the Crown vis-a-vis its indigenous peoples: it also imposes a legal duty to act honourably towards a Treaty partner, and calls the Crown to account if it fails to do so.

The Canadian cases show that the standard set for honourable behaviour is driven by practicality and reciprocity. *Haida* holds that if no consultation at all occurs there will be a breach of duty. In similar fashion, Maori should be given meaningful opportunities for consultation at all appropriate stages of any government action likely to affect the customary interests they hold in their traditional territories. This would be much easier to implement than the ad hoc consultation process preceding the enactment of the

¹⁶⁸ [1994] NZRMA 529.

¹⁶⁹ Wicks, n7 at 43.

¹⁷⁰ *Lands case*, n165.

Foreshore and Seabed Act, which left both Maori and Crown unsure of the correct procedure, and resulted in mass protests and discontent. Furthermore, the finding of the Canadian court in *R v Douglas* that the duty to consult is tempered by the reciprocal nature of the Crown-Aboriginal relationship mirrors the reciprocity underpinning the Treaty of Waitangi in Aotearoa New Zealand: a concept with which New Zealand courts are very familiar.

There has been tentative judicial movement toward such an approach in Aotearoa New Zealand; in the *Lands case*, Richardson J noted that the conduct of the government must conform to the *honour of the Crown*.¹⁷¹ It had been argued that the concept of the *honour of the Crown* lies at the heart of the Crown perception of the Treaty.¹⁷² The Court accepted that Lord Normanby's Instructions to Hobson of 14 August, 1839, to engage "the faith of the British Crown", reflected the approach of the British authorities to the proposal for the Treaty.¹⁷³ These Instructions emphasised that "all dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands".¹⁷⁴ Additionally, the Instructions from Lord Stanley issued on 13 June, 1845, after questions had been raised about the significance of the Treaty, directed Captain Grey as Lieutenant Governor, to "honourably and scrupulously fulfill the conditions of the Treaty of Waitangi".¹⁷⁵ Thus we see that Crown conduct in New Zealand was grounded in upholding the principle of the *honour of the Crown* just as it was in Canada.

The New Zealand Court of Appeal in the *Lands case* held that where the focus is on the role of the Crown and the conduct of the government, emphasis on the *honour of the Crown* is important. "It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country."¹⁷⁶ The Court also emphasised that inherent in the Treaty of Waitangi is the concept of an ongoing partnership founded on the expectation of good faith by both the Crown and Maori when dealing with each other: "To say this is to do no more than assert the maintenance of the 'honour of the Crown' underlying all its Treaty relationships".¹⁷⁷

Such comments from the New Zealand Court of Appeal contain strong undertones of the Canadian Supreme Court's view that the *honour of the Crown* is, in essence, the conscience of the country. The constitutional importance of the Treaty of Waitangi makes it pertinent to invoke the conscience of the country in Crown-Maori dealings under it.¹⁷⁸ Every aspect of modern New Zealand society has some causative link to the Treaty. Incorporating the principle of the *honour of the Crown* as a Treaty Principle would not only recognise its importance for the Crown in 1840 when the Treaty was signed, and the integral part the duty of the *honour of the Crown* has played in New Zealand's history, but also the ongoing importance that it has for New Zealanders today.

¹⁷¹ Ibid.

¹⁷² Ibid, 682.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid, 703.

¹⁷⁸ Discussed in M Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution*, Victoria University Press, 2008, 26.

Such a historically important and wide-ranging principle ought to be recognised as an overarching principle of the Treaty of Waitangi, under which set standards for consulting Maori naturally arise as a fundamental aspect of honourable conduct .

CONCLUSION

Four sources of consultation rights for Aboriginal Peoples exist in Canada. The strongest and most extensive of these sources is the principle of the *honour of the Crown* which has been elevated from a morally unenforceable political principle to a legally enforceable standard. The duty to consult is essentially the Crown seeking a fair decision, through fair procedures, in accommodating government sanctioned actions affecting Aboriginal people. It is triggered when the Crown has real or constructive knowledge of the potential existence of Aboriginal rights or title and is contemplating conduct that might adversely affect those rights. The content of the duty to consult is assessed using a spectrum analysis. It will vary according to the strength of the Aboriginal claim and the impact of the contemplated government action on the interests underlying the claim. Good consultation, according to the Supreme Court of Canada, occurs when Aboriginal peoples are given meaningful opportunities for consultation at all appropriate stages of the government action under consideration.

The Canadian experience highlights that the Crown is not free to engage in “ad hoc” consultation. Canadian case law has established set principles by which consultation should occur and by which to measure and hold the Crown accountable for its conduct.

The processes leading up to the Foreshore and Seabed Act and the recent sale of State Owned Assets demonstrate the absence of a similar duty to consult in Aotearoa New Zealand. This has led to disjointed and unsatisfactory consultation processes which would constitute a breach of duty in Canada. On a more positive note, New Zealand already has legal mechanisms by which a duty to consult similar to that in Canada could be implemented. The Crown’s historic dealings with Maori, including the signing of the Treaty of Waitangi, were specifically instructed to be undertaken in a manner consistent with upholding the *honour of the Crown*. It is, therefore, appropriate to incorporate the *honour of the Crown* as an overarching principle of the Treaty of Waitangi which produces a duty to consult whenever Treaty principles are invoked.

HISTORICAL DEVELOPMENT OF THE TAX REGIMES OF MAORI AUTHORITIES IN AOTEAROA NEW ZEALAND AND FIRST NATIONS IN CANADA

Audrey Sharp*

INTRODUCTION

In colonial-based state democracies, taxation reflects the relationship between citizens and the government responsible for raising and spending public revenue. Politicians must persuade the voting public that they can impose fair taxes and wisely spend public funds. Aotearoa New Zealand and Canada are two English-settled states with significant indigenous populations. The indigenous peoples in both of these countries already had their own systems for sharing resources and ensuring accountability of their leaders in a manner that is loosely comparable to taxation.¹ The new tax regimes imposed upon the indigenous peoples of Canada and Aotearoa New Zealand since colonisation have had a major effect upon their ability to be self-determining² as First Nations³ and as Maori hapu and iwi.

This article compares the post-colonial development of the Maori Authority⁴ tax regime in Aotearoa New Zealand and the taxation of Indian Bands⁵ as First Nations on reserve lands⁶ in Canada. While differences in circumstances and taxation regimes makes direct comparison difficult, the measures adopted in each country can be assessed according to whether they encourage or restrict the self-determination aspirations of each indigenous group as set out in the Declaration on the Rights of Indigenous Peoples.

* Audrey Sharp is a Senior Tutor in the Faculty of Commerce at the University of Auckland, Aotearoa New Zealand.

¹ “Potlatch” refers to the “giving” ceremonies of First Nations in which gifts are bestowed upon guests and personal property is destroyed by the giver, in a show of wealth and generosity. Discussed in C Bracken, *The Potlatch Papers: a colonial case history*, University of Chicago Press, Chicago, 1997; and D Cole and I Chaikin, *An iron hand against the people: the law against the potlatch on the Northwest coast*, Douglas and McIntyre, Vancouver, 1990. Similarly, the traditional Maori practice of large-scale reciprocal giving between groups at tangihanga (funeral) and other group gatherings was also based on the need to uphold the mana (prestige) of the group by engaging in utu (reciprocal practices).

² This article adopts the meaning of “self-determination” set out in the Declaration on the Rights of Indigenous Peoples 2007, which supports greater recognition of indigenous cultural, economic and political rights and autonomy in colonised countries. The Declaration was adopted by the United Nations General Assembly during its 61st session in New York on 13 September 2007.

³ The term “First Nations” in this article refers to “Indians” as defined in the Indian Act 1876 and subsequent amending legislation. An “Indian” is defined as a person who “is registered as an Indian or is entitled to be registered as an Indian” under section 2 of the Indian Act, RSC 1985. By way of contrast, section 35(1) of the Constitution Act 1982, contains a broader definition of the “Aboriginal Peoples” of Canada which includes Indians, Inuit and Metis.

⁴ “Maori Authority” refers to any body, authority or person administering or controlling property in trust for the benefit of Maori. Other entities, including the Board of Maori Affairs, the Maori Trustee, Maori land boards, special statutory trusts (such as the East Coast Commissioner) and land trusts established under the Native Land Act 1931, were also included in the definition after 1939.

⁵ A “band” is a legally recognised body of Indians for whose collective benefit lands have been set apart or for whom money is held by the Canadian Crown, under the Indian Act.

⁶ A “reserve” is a tract of land vested in the Crown but set apart for the use and benefit of a band under the Indian Act. It also includes “designated lands” created as the result of the Kamloops Amendments in 1988, which are discussed later in this paper.

These aspirations can be briefly stated as being the desire to achieve greater political, economic and cultural autonomy.

The article begins with statistical information on the Maori contribution to the national economy in Aotearoa New Zealand, as a baseline for Maori self-determination. Next, it outlines the development of the Maori Authority tax regime from 1939 up to and including the passage of the Income Tax Act 2007. This is followed by statistical data on First Nations, and an analysis of the taxation policies in Canada from the passing of the Canadian Constitution Act 1867 to the present day. In both countries “self-determination” is a means of indigenous communities improving their socio-economic conditions after colonisation.⁷ While the main thrust of the article is taxation, it concludes by assessing the extent to which the taxation measures that have been introduced in Aotearoa New Zealand and Canada encourage or thwart the self-determination aspirations of Maori and First Nations.

MAORI STATISTICAL OVERVIEW IN AOTEAROA NEW ZEALAND

In 1840 Maori constituted 95 percent of the population: in 2006 they were 14.6 percent of Aotearoa New Zealand’s total population.⁸ In 1840 Maori claimed 98 percent of the territory of Aotearoa under the Maori customary law principles of *ahi kaa*⁹ (occupation and use) and *take tupuna*¹⁰ (ancestral connections): in 2006 Maori collectively owned only 5.6 percent of the total available land under *Te Ture Whenua Maori Act 1993* and its predecessors, special legislation introduced to superimpose English property law principles on to customary Maori land tenure.¹¹

Today, Maori are statistically over-represented in negative statistics for unemployment,¹² child health¹³ and low educational achievement.¹⁴ Despite this, in 2005/2006 total Maori-owned commercial assets were estimated at nearly \$16.5 billion.¹⁵ \$5.9 billion, or 36 percent of this asset-base, is in collective ownership.¹⁶ The

⁷ This is the view taken by the Harvard Project on American Indian Economic Development, which researched the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations. Many of the Project’s research findings can be generalised to indigenous groups outside of the United States, including Maori and First Nations.

⁸ QuickStats About Maori, Revised 27 March 2007, available from Statistics New Zealand on <www.stats.govt.nz/census/2006CensusHomePage/QuickStats/quickstats-about-a-subject/maori/maori-ethnic-population-e-momo-iwi-maori.aspx>.

⁹ See Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report, Wai-788, Wai-800*, Ministry of Justice, 2001.

¹⁰ Ibid.

¹¹ *Te Ture Whenua Maori Act 1993* and its predecessors. The Native Land Act 1862 established a Native Land Court to change customary land tenure into a system of collective ownership held in individual shares that could be more easily acquired by the Crown. See, T Kingi, “Maori Land Ownership and Land Management in NZ”, *Case studies on customary land and development in the Pacific*, Vol 2, Institute of Natural Resources, Massey University, New Zealand, 2008, found on http://www.ausaid.gov.au/publications/documents/mlw_volumetwo_casestudy_7.pdf<www.ausaid.gov.au/publications/pdf/MLW_VolumeTwo_Casestudy-7.pdf>.

¹² QuickStats About Maori, n8.

¹³ http://www.stats.govt.nz/browse_for_stats/people_and_communities/housing/ethnicity-crowding-1986-2006.aspx

¹⁴ <http://wdmzpub01.stats.govt.nz/wds/TableViewer/tableView.aspx>.

¹⁵ “The Maori Asset Base”, *Fact sheet Te Puni Kokiri, Te hua Ohanga Maori-A-Motu*, <www.tpk.govt.nz>.

2006 Census records 14,007 self-employed Maori and 7,062 Maori business employers. 52 percent of all Maori commercial assets are invested in primary industries, 8 percent in secondary industries and 40 percent in tertiary industries, providing a total asset worth of \$16,450 million.¹⁷ Maori also hold 37 percent of all available fishing quota and own some of Aotearoa New Zealand's most successful tourist operations.¹⁸

Maori economic development has benefited from compensation paid through Treaty of Waitangi settlements, with a total value of \$1.018 billion in negotiated settlements being allocated to iwi and Maori organisations by October 2008.¹⁹ Maori have seven seats in Parliament, as well as being eligible to stand in general electorate seats or be appointed as a Party list member to Parliament.

This brief overview shows that Maori are a significant sector of Aotearoa New Zealand's national social and economic statistics. As such, successive governments have always needed to develop policies appropriate to meeting Maori needs and concerns, including the Maori drive toward greater self-determination. Taxation is one of several policies that can assist in making this aspiration a reality.

TAXATION OF MAORI AUTHORITIES IN AOTEAROA NEW ZEALAND

Taxation before 1939

After the Treaty of Waitangi was signed in 1840, customs duty was the first tax imposed, followed by direct taxation on property and then on income. Taxation in this form was a new concept for Maori, who contributed most of the early taxation imposed. In 1856, an official report estimated that Maori paid around 60 percent of the North Island's customs dues.²⁰

Before 1939 there were two separate taxes levied on income, namely, income tax and a social security charge.²¹ Income tax was imposed at a graduated rate, while the social security charge was set at a flat rate. Maori were subject to these taxes, in the same way as other resident taxpayers. However, section 550 of the Native Land Act 1931 contained provisions that prevented income derived by some Maori organisations, on behalf of their members, from being used to pay tax. The vast number of reserves, funds and lands administered by Maori organisations and subject to section 550, made it

¹⁶ "Tribal Assets: Nga Rewa a Iwi", *Information Sheet Maori economic Summit*, Te Puni Kokiri, 2009. [Tribal Assets] <www.tpk.govt.nz>.

¹⁷ Ibid.

¹⁸ According to Te Puni Kokiri <www.tpk.govt.nz> one in five (455,000) of all adult international tourists to Aotearoa New Zealand visited a Maori cultural tourism site in 2006. There are more than one hundred Maori tourism operators. In 2001, thirteen Maori regional tourism organisations were formed and in 2004 they combined into a national tourism body that is headed by the New Zealand Maori Tourism Council.

¹⁹ Tribal Assets, n16.

²⁰ See P Goldsmith, *We Won, You Lost. Eat That! A political history of tax in New Zealand since 1840*, David Ling Publishing, Auckland, 2008, which focuses on the development of the Maori Authority Concessionary Tax Regime that operates under Part HF of the Income Tax Act 2007.

²¹ For a full discussion on the 1939 reforms see A Sharp, "New Zealand's Income Tax Law as it applies to Maori Authorities and its impact on Maori economic sustainable development within Tai Tokerau", Dissertation for the degree of Master of Taxation Studies, University of Auckland, 2000, 26-33.

difficult for individual Maori to work out and fulfil their income tax obligations. The problem persisted from 1929, when farming profits became subject to income tax for the first time, until 1939, when the Land and Income Tax Act 1923 was amended to include specific rules for “Maori Authorities”.²²

1939 Reforms

The Income Tax Amendment Act 1939 imposed income tax on organisations that administered large blocks of farmland owned in common by Maori. Organisations affected by the taxation rules included the Board of Maori Affairs, the Maori Trustee, Maori land boards and various land trusts incorporated under Maori land legislation.²³ The amendment fixed a Maori Authority’s liability on the individual owner’s share of any income from Maori land, or on any income earned by an organisation that administered property, income or reserves in trust for the benefit of Maori. Effectively, it removed the restrictions imposed by section 550 of the Native Land Act 1931, allowing income tax liability to be taken directly from income earned, by the Maori Authority. The common feature of the organisations covered by the new term “Maori Authority” was that they acted as agents for, or as a trustee on behalf of, individual owners.

The 1939 Amendment Act made it clear that taxation was to be paid by the Maori Authority on behalf of its owners, on an assessment of their respective shares of the whole net profit earned by the Authority, and not only on the part that was distributed by way of dividend. Maori Authorities generally ignored the Amendment.²⁴

1952 Commission of Inquiry

The legislation remained unchanged until 1952, when the Luxford Commission’s²⁵ recommendation for a new taxation framework for Maori Authorities was incorporated into law. The Commission had been established to investigate the non-compliance of many Maori Authorities with the 1939 Amendment Act and to suggest how the law could be made clearer. The Commission noted that although Maori land was derived through the iwi and held in co-ownership, the law nevertheless followed the rationale that each individual Maori was entitled to a share in land that could be measured in terms of acres, roods, and perches, and, therefore, to a corresponding share of the profits derived from that land.²⁶

Two important factors were considered by the Commission. First, much of the land

²² *The Working of the Law relating to the Taxation of Maori Authorities, Report of Commission of Inquiry appointed to inquire into and report upon the working of the law relating to the taxation of Maori authorities*, Government Printer, Wellington, 1952 [*Luxford Report*].

²³ The history of Maori land legislation from the signing of the Treaty of Waitangi to the present day is discussed by the Waitangi Tribunal in several of its reports. See for example: *Muriwhenua Land Report, Wai-45*, March 1997; *The Ngai Tahu Report, Wai-27*, 1991; *The Hauraki Report, Wai-86*, 2006.

²⁴ *Luxford Report*, n22.

²⁵ *Ibid*.

²⁶ This reveals the conflict between European notions of individual land ownership and Maori notions of collective land ownership. The Crown attempt to impose European concepts of individual ownership into its system of land taxation for multiply owned Maori land was doomed to fail because the two are inherently different in the values they attribute to land.

owned collectively by Maori required large-scale farm management, so that multiple ownership made delegation of control to a corporate structure necessary. It was illegal at this time for more than twenty persons to carry on any form of joint business enterprise unless they were incorporated as a company or other legal entity.²⁷ For reasons of organisation and control, the “Maori Incorporation”²⁸ became the structure authorised by statute to administer corporate Maori land assets. Second, a Maori incorporation differed from an ordinary registered company. A company is a legal entity that is separate from its shareholders. A Maori incorporation has most of the functions of a company, but the beneficial ownership of the incorporation's assets, and the income it derives from this ownership, vests in the individual owners in accordance with their respective shares in the land. Under the system of statutory succession that operates for Maori land, the number of owners in each block increases exponentially over the years while their relative shares decrease. Blocks existed where the shares of owners were now infinitesimal.²⁹ The Commission saw these factors as being significant. It was apparent that the complex character and circumstances of Maori Authorities and their large collective ownership groups made them different from other commercial entities. Maori Authorities had hundreds, perhaps thousands of owners. Furthermore, at the time of the Inquiry, many incorporations were transforming themselves from being mere landlords into active owner-farmers. They needed to withhold a large portion of their income from distribution in order to raise the necessary capital for the new venture. In some cases the undistributed income was considerable. Section 29(3) of the Land and Income Tax Amendment Act 1939 had been introduced to exclude taxation of such sums.³⁰

The Commission found that the 1939 legislation intended to avoid charging Maori Authorities as companies, as liability would have imposed graduated income tax rates, although not quite as high as the maximum rates applicable to non-Maori trustees income. The most viable practical alternative was to provide for the whole of the income for each year to be apportioned to each individual Maori owner as if the trust or incorporation was a partnership. The beneficiary would then be assessed for income tax on his or her share at the graduated rates applicable after all exemptions and allowances had been taken into account. The effect was to confer a benefit on Maori Authorities that was not available to other trusts.³¹

The Commission found that while the purpose of section 29 was to minimise the tax burden of Maori owners by treating them as partners, the section was ineffective for the following reasons:³²

- The large numbers of owners involved in property run by a Maori Authority;
- The need for owners to accumulate capital for property development now that

²⁷ Section 372(1) Companies Act 1933. This was increased to 25 persons by section 456(1) Companies Act 1955. Section 456 was repealed by the Companies Act 1993.

²⁸ This structure is similar to a company established to facilitate and promote the use and administration of Maori freehold land on behalf of its owners. Maori incorporations were designed as land management structures specifically to administer whole blocks of communally owned land as commercial enterprises.

²⁹ Fractionation and fragmentation of title are discussed in G Asher and D Naulls, *Maori Land*, New Zealand Planning Council, Wellington, 1987.

³⁰ C Edward and A Sharp, “The Taxation of Maori Authorities” (2003) 9, *NZJTL*, 287, 294-295.

³¹ *Ibid*, 295.

³² *Luxford Report*, n22.

they were working their properties rather than simply being landlords collecting rent. This required withholding a large part of the income rather than paying it out to the owners;

- Maori Authorities had to pay income tax on behalf of some, but not all, owners. There was lack of uniformity because of the graduated rates of taxation applicable at the time and Authorities had difficulty relating unequal tax payments to an equality of distribution; and
- staffing shortages in the Maori Affairs Department meant that initially it was unable to administer the section. Despite the passing of section 4 of the Land and Income Tax Amendment Act 1946, which simplified the tax procedure, most Maori Authorities ignored it and the Commissioner of Taxes did not enforce compliance.³³

The Commission recommended treating Maori Authorities as a separate class to be assessed for income tax purposes on undistributed income at an appropriate flat rate. There were several reasons for this. First, the Authority was, in most cases, tangible evidence of the unity of the iwi and should be treated as an entity separate from its owners for taxation purposes.³⁴ Second, a block of Maori land held in common ownership had to be worked as a whole and could not be partitioned among several owners so that each could be viewed as an economic unit. The Commission contended that a small owner bore an undue proportion of income tax when a flat rate was levied on undistributed profits and may not be liable for income tax at all on their share of the net profits. At the same time an owner gained by the whole area being worked as a unit.³⁵

The Commission wanted to ensure that Maori lands made an adequate contribution to government revenue, while at the same time recognising that Maori Authority land structures required a special system of taxation. Maori Incorporations were seen as unique hybrid entities that possessed aspects of a partnership, trust, and a company. The Commission also noted the practical difficulty of collecting taxation from individual Maori owners unless deductions were made at the source of the income. It was, therefore, decided to be in the best interest of the Maori taxpayer and the government, to tax Maori owners' income at source.³⁶

The Commission's findings led to the introduction of a specific legislative regime for Maori Authorities and the imposition of a flat tax rate on distributed beneficiary income. These early legislative provisions were incorporated into the Income Tax Act 1994 and the government reviewed the rates in 2001.³⁷ Other than an increase in the base flat rate from 20 percent to 25 percent and the introduction of resident withholding tax on distributions made by Maori Authorities, no other changes were made between 1954 and 2001.

³³ Ibid.

³⁴ The essential character of a "Maori Authority" was that it was a legal body that administered property, income and reserves in trust for the benefit of individual Maori owners.

³⁵ Sharp, n21.

³⁶ Ibid.

³⁷ M Cullen, P Horomi, P Swain and J Wright, "Taxation of Maori Organisations, Government discussion document", *Tax Simplification 2*, Inland Revenue Department, Wellington, August 2001.

2001 Review of Taxation of Maori Authorities

In 2001, the government published a discussion document, *Taxation of Maori Organisations*,³⁸ noting that tax rules relating to Maori Authorities had not been included in any major tax policy reforms for almost 50 years.³⁹

The main objective of the review was to determine whether the income tax laws that applied to Maori organisations and businesses acted as a barrier to Maori economic and social development. If a barrier was found to exist then changes had to be made thereby allowing these groups to meet their tax obligations. The review was also part of the overall programme by the government to simplify tax requirements for individuals and businesses as part of its commitment to improve equity.

Under the Treaty of Waitangi the government is required to actively protect Maori interests.⁴⁰ The political and cultural aspects of tax law reform requires the government to identify relevant Maori interests and gather Maori views on its tax proposals as part of the government's decision-making process. Public consultation elicited the need for cultural and political differences between Maori and non-Maori organisations to be incorporated into the framework of future tax policy development.

The review⁴¹ examined the "charitable" aspects of Maori Authorities and proposed relaxation of the "public benefit" test.⁴² Maori Authorities often provide benefits of a charitable nature to iwi⁴³ and hapu,⁴⁴ but may not qualify for a tax exemption because the benefit extends to a group of people connected by blood rather than to the general public. The government believed that if an organisation met the legal requirement for "charitable purpose" then it should not automatically be excluded from receiving a tax exemption simply because the individuals concerned had blood ties. It accepted that the cultural difference between Maori Authorities and other non-Maori organisations was relevant when imposing taxation.⁴⁵

The various proposals outlined in the review were intended to improve the way Maori authorities are taxed. Under the old rules applying to Maori authorities, there existed the potential for double taxation. The proposals removed this issue, addressed other technical problems and minimised the extent to which individual members of a Maori

³⁸ Ibid.

³⁹ Edward and Sharp, n30 at 299.

⁴⁰ That the Treaty of Waitangi signifies a "partnership" between the Crown and Maori is a principle firmly established by the Court of Appeal in several cases, including *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 667, in which Cooke P reiterated that "the principles require Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost faith. The duty is not a light one. It is infinitely more than a formality. If a breach of duty is demonstrated ... the duty of the court will be to insist that it be honoured".

⁴¹ Cullen et al, n37.

⁴² The public benefit requirement indicates a purpose that adds to or advantages a section of the community rather than an individual. For a detailed discussion on the "public benefit test" and the result of the enactment of section OB 3B into the ITA 94, see A Sharp and F Martin, "Charitable Purpose and the Need for a Public Benefit: A Comparison of the Tax Treatment of Australian and New Zealand Charities for Indigenous Peoples", *Australian Tax Forum*, (2009) 24, 2.

⁴³ The word "iwi" means "peoples" or "nations".

⁴⁴ "Hapu" is the Maori word for a descent group or clan.

⁴⁵ Sharp and Martin, n42. The article discusses the implications for Maori of the relaxing of the public benefit test for marae in particular.

authority must interact with the tax system.⁴⁶

Three options⁴⁷ were presented for discussion and consideration. They reflected the existing tax models used in income tax law but were adapted to acknowledge the specific characteristics of Maori Authorities. A new definition of “Maori Authority”⁴⁸ was proposed listing the types of organisations eligible under the new rules and ensuring that private organisations with Maori members were excluded. Maori organisations and businesses that met the definition of “Maori Authority” were able to opt out of the proposed rules in favour of general tax rules if they met the general rules criteria.⁴⁹

The Legislative Outcome

The Taxation (Annual Rates, Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003 completely replaced the rules applying to Maori Authorities, from the beginning of the 2005 income tax year. The Act recognises the need for a special tax framework for Maori organisations that manage Maori assets held in communal ownership. In doing so it reflects most of the public submissions and the government policy of ensuring that Maori organisations are not disadvantaged in their economic development.⁵⁰ The legislation contains the following key features:

- A new definition of Maori Authority that lists entities eligible to apply the new rules.⁵¹
- Maori Authorities may opt out of the Maori Authority Rules and apply general tax rules if they meet the requirements of the general rules.⁵² Maori Authorities may re-enter the Maori Authority Rules subject to the winding up tax consequences that apply to entities.⁵³
- A Maori Authority has a tax rate of 19.5 percent,⁵⁴ reflecting the tax rate of the majority of individuals deriving benefits from Maori Authorities.⁵⁵
- A credit attribution system, called a Maori Authority Credit Account [MACA] similar to the company imputation model is part of the new rules. This means that tax paid by or on behalf of the Maori Authority gives rise to a tax credit that can be attached to the distributions to members of tax-paid income. Recipient

⁴⁶ Edward and Sharp, n30 at 299.

⁴⁷ Cullen et al, n37 at chapter 5.

⁴⁸ The definition includes organisations established in accordance with: Te Ture Whenua Maori Act 1993; the Maori Trustee Act 1953; the Maori Trust Boards Act 1955; and organisations established for the benefit of all Maori or for the benefit of iwi or hapu (if such groups are large enough to constitute a significant section of the public) and marae. See s HF 2 of ITA 2007.

⁴⁹ Cullen et al, n37 at chapter 5.

⁵⁰ Thirty-three submissions were received from a variety of organisations including the Maori Council, the Federation of Maori Authorities [FOMA], the Maori Trustee, and various accounting organisations.

⁵¹ See HF 2 ITA 07.

⁵² Rules governing trusts, companies and incorporated societies that are applicable to all New Zealand taxpayers under the relevant parts of the ITA 2007 and other legislation pertinent to the particular entity structure. For example the Companies Act 1993 regulates New Zealand companies.

⁵³ See HF 11 ITA 07, which outlines when a Maori Authority election is no longer effective. If an entity meets the definition of a Maori Authority it will need to satisfy all its tax obligations in the other entity before entering the Maori Authority regime with a clean slate.

⁵⁴ The 19.5 percent flat rate introduced in 2005 was dropped to 17.5% in 2011, reflecting decreases in the marginal tax rates applying to all New Zealand taxpayers on lower income levels.

⁵⁵ The tax rate for a Maori Authority is provided in Schedule 1, ITA 07.

members are then able to use these tax credits to satisfy their tax liabilities. Unused tax credits are refundable to the recipient member.⁵⁶

- Maori Authorities are able to distribute non-taxable amounts, such as treaty settlement assets, to their members tax-free.⁵⁷
- The Act removes the agent tax rules from the Maori Trustee. The Maori Authority rules will apply in all situations, creating a standardisation in approach.⁵⁸
- A Maori organisation that meets the “charitable purposes” requirement is no longer automatically excluded from the “charitable” income tax exemption because its members are connected by blood. Other factors such as the nature of the entity, the activities it undertakes, the potential beneficiary class, their relationship and numbers, are also considered. This provides greater certainty for Maori and non-Maori organisations about how the “charitable” income tax exemption applies when beneficiaries are kin.⁵⁹
- Any marae situated on a Maori reservation that solely applies its funds to the administration and maintenance of the physical structures of the marae will qualify for a charitable tax exemption. This places marae in the same category as churches and public halls that carry out similar functions.⁶⁰
- Maori Authorities who donate to Maori associations are able to receive a deduction for gifts of money to organisations with “approved donee status”.⁶¹ The deduction is limited to the amount of the Maori Authority’s net income in the corresponding tax year.

The relaxation of the “public benefit” requirement applied from the beginning of the 2003-04 income year. The other amendments came into force at the beginning of the 2004-05 income year.

Does the new Regime enhance Maori Self-Determination?

The Treaty of Waitangi established obligations between the Crown and Maori and requires policymakers to consider political and cultural criteria when reviewing

⁵⁶ The rules relating to the Maori Authority Credit Account [MACA] are set out in Subpart OK ITA 07. They operate in a similar way to the imputation rules that apply to companies in New Zealand. This means that the receiver of the distribution from a Maori Authority can receive a credit (called a Maori Authority Credit) for tax paid by the Maori Authority on the income it has received. This credit can be offset against the receiver’s tax liability. Subpart OK sets out the way the Maori Authority records tax paid and distributions made through MACA.

⁵⁷ The rules applying to Maori Authority distributions are found in sections HF 4, HF 5, HF 6, HF 7 and HF 8, ITA 07.

⁵⁸ The Maori Trustee is specifically included as an eligible Maori Authority in section HF 2(4) ITA 07.

⁵⁹ The definition of “charitable purpose” in YA 1 ITA 07 has been widened to include beneficiaries of a trust or members of a society or institution who meet the public benefit requirement even if they are related by blood. The definition also specifically refers to marae having a charitable purpose when the funds are used for the administration and maintenance of the land and the physical structure of the marae. The same definition has also been included in the Charities Act 2005. The IRD released two government discussion documents *Tax and Charities* and *Taxation of Maori organisations* in 2001, looking at the definition of “charitable purpose” and seeking public submissions. The discussion seeks to improve the way organisations are able to meet the public benefit test requirement when they are clearly performing a charitable purpose. See discussion in Sharp and Martin, n42.

⁶⁰ See A Sharp, “The Taxation Treatment of Charities in New Zealand with specific reference to Maori authorities including marae”, (June 2010) 16(2) *NZJTL* 177.

⁶¹ Rules to donations by a Maori Authority are outlined in section DV 12 ITA 07.

taxation laws applying to Maori. Maori bore the brunt of taxation during the establishment of the colony, and the paternalistic attitude apparent in much of the older legislation still rankles with Maori. Reviews of legislation such as the Maori Trustee Act 1921 and the Maori Trust Boards Act 1955 have criticised the paternalistic framework of European concepts and controls it imposed upon Maori. During a recent review of these statutes in 2007, Maori Party co-leader, Tariana Turia, stated: "We are tired of the Government's paternalistic wish-list approach to Maori".⁶² In speaking during the third reading of the Amendment Bill, Maori Party member of Parliament, Hone Harawira, stated:⁶³

Mister Speaker, throughout the debate on this bill, many speakers have referred to the influence of "paternalistic bureaucracy"; a concern raised time and time again by the beneficial owners about the independence of the Maori Trustee from the Crown, and we congratulate the Minister for recognising the desire of those beneficial owners of Maori land, that they be consulted on how the Maori Trustee can best meet their needs, and we recognise in this bill, the foundation to ensure that the Maori Trustee can meet its obligations to those beneficial owners.

Uncritical acceptance of this attitude within wider society has led to Maori affairs continuing to be viewed in terms of a dependant, welfare model.

Does the new regime change this? The concessionary taxation of Maori Authorities recognises that if Maori are to significantly contribute to the country's economy, taxation rules need to ensure that Maori Authorities are encouraged to do so. Maori Authorities have been recognised as having unique features that make them very different from a company or trust. The Waitangi Treaty settlement process also saw the creation of the "mandated Maori organisation",⁶⁴ an entity that has been vetted and accepted by the Crown as being competent to hold assets on behalf of an iwi. According to Selwyn Hayes, this is positive because:⁶⁵

Iwi have the opportunity to build an effective organisational structure that has a sound economic base ... The Maori authority tax regime has been specifically designed to suit the needs of Maori organisations. As such, it can offer benefits not available elsewhere in the tax system.

The specific taxation regime with its concessionary tax rate applicable to a Maori Authority is an acknowledgement by the government that there are unique features

⁶² Tariana Turia, "New Zealand joins the 'Coalition of the Willing' against Indigenous Rights", Friday, 14 September 2007, available at <http://www.scoop.co.nz/stories/PA0709/S00256.htm>.

⁶³ Amendment Bill, Third Reading, Thursday, 7 May 2009, available at <http://maoriparty.net/index.php?pag=nw&id=310&p=speech-maori-trustee-hone-harawira8207.html>

⁶⁴ Section HF 2 ITA 07 defines who is eligible to be a Maori Authority and includes: mandated asset holding iwi organisations (either companies or trusts) established under the Maori Fisheries Act 2004 or recognised by Te Ohu Kai Moana Trustee Limited as a Mandated Iwi Organisation. (The difference between the two is that a company or trust can be a mandated iwi asset holding structure under Te Ohu Kai Moana Trustee Ltd but not hold fisheries assets. Also a Mandated Iwi Organisation must meet governance criteria set out in section 12 of the Maori Fisheries Act 2004); those receiving and managing assets under the Treaty of Waitangi; Trusts established or owning land under Te Ture Whenua Maori Act 1993; the Maori Trustee; Maori Trust Boards; the Crown Forestry Rental Trust; Te Ohu Kai Moana Trustee Limited; and Aotearoa Fisheries Limited.

⁶⁵ S Hayes, "Tax Structuring for Iwi Organisations: Challenges and Principles of Tax Structuring for Tribal Development", *Governing and Running Maori Entities, Tribal development and the law in the 21st century*, New Zealand Law Society Intensive, (21 August 2009) 55 available at <www.lawyerseducation.co.nz>

applicable to Maori land ownership and the holding of communal assets by Maori.

However, the regime itself offers little to enhance either Maori self-governance or self-determination as set out under the Declaration on the Rights of Indigenous Peoples. It is arguable that it continues the paternalism that has been apparent from the outset of the colony. The entities that qualify as Maori Authorities are still imposed structures under which Maori are required to adapt their cultural values and governance norms to fit imposed legislatively pre-determined guidelines. Under the present regime, the best support for Maori self-determination is found in the concessions around “public benefit”, which give Maori Authorities greater choice about how they structure their affairs under Pakeha taxation models.

“ABORIGINAL/FIRST NATIONS/ INDIAN” STATISTICAL OVERVIEW IN CANADA

Over 1.3 million Canadians reported having Aboriginal ancestry in the 2006 Census, representing 3.8 percent of the total population.⁶⁶ However, not all individuals with Aboriginal ancestry are active members of an Aboriginal community, people or nation. Further, as with Maori, prior to colonisation by Europeans, Aboriginal peoples were the original land occupiers and inhabitants of Canada’s immense geographical landmass. The population statistic reflects that those individuals with Aboriginal ancestry are still a significant cultural grouping and an important part of modern Canada.⁶⁷ In 2006, 50,485 individuals identified as Inuit, 389,785 as Metis and 698,025 as First Nations.⁶⁸ Of these, 623,780 or 81 percent were Registered Indians.⁶⁹ 68 percent of Registered Indians were living “off reserve” while 32 percent did not have Registered Indian status. 98 percent of the Aboriginals living on reserves were Registered Indians.⁷⁰ The highest concentrations of these people lived in the Northwest territories (31 percent), Yukon (21 percent) and Saskatchewan (10 percent).⁷¹

In 2006, 45 percent of “First Nations”⁷² lived in urban areas and numbered approximately 698,025. There are 615 First Nations,⁷³ and 11 distinct First Nations language families throughout Canada.⁷⁴ First Nations are disproportionately represented

⁶⁶ Canadian Statistical information from the 2006 Census retrieved from <http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/canada.cfm>. [2006 Census]

⁶⁷ Section 35 Constitution Act 1982, n3.

⁶⁸ 2006 Census, n66.

⁶⁹ Ibid. “Registered Indians” is a term used to describe an “Indian” who is registered as such, or entitled to be registered, under the Indian Act. See n3 above.

⁷⁰ 2006 Census, n66.

⁷¹ Ibid.

⁷² Ibid. The information in the census is unclear because “First Nations” sometimes includes both “Band/Reserve Indians” who qualify under the Act and those Aboriginals who have lost their status under the Act and are therefore not entitled to live on the Reserve or be a Band member. It is also juxtaposed with “Aboriginal” as an all-inclusive term used to describe all the pre-colonial groups who still occupy Canada. In this article the taxation regime of “First Nations” refers only to Band/on Reserve Indians as defined under the Indian Act. See notes 3, 5 and 6 above.

⁷³ The 50 languages of Canada's indigenous peoples belong to 11 major language families - 10 First Nations and Inuktitut.

<http://atlas.nrcan.gc.ca/auth/english/maps/peopleandsociety/lang/aboriginallanguages/1>

⁷⁴ <http://www.statcan.gc.ca/daily-quotidien/080115/dq080115a-eng.htm>.

in Canada's negative statistics. In 2006, 44.4 percent of First Nations living on reserves lived in dwellings requiring major repairs, compared to 7.0 percent of the non-Aboriginal population.⁷⁵ Over one quarter (25.6 percent) of First Nations living on reserves lived in houses with more than one person per room, compared to 2.9 percent for the non-Aboriginal population.⁷⁶ According to the *First Nations Regional Health Survey*, 21 percent reported having no access to a rubbish collection and 9 percent reported that they lacked either a septic tank or sewage service.⁷⁷

In 2006, the median income in Canada for Registered Indians living on reserves was less than half that of the non-Aboriginal population (\$11,229 compared to \$25,955).⁷⁸ In 2006, the unemployment rate for Registered Indians living on reserves was almost one in four (24.9 percent). This compares to 6.3 percent for the non-Aboriginal population. About 65 percent of Aboriginal children living on reserves lived with two parents compared with only 50 percent in census metropolitan areas. In contrast, almost 83 percent of non-Aboriginal children lived with two parents.⁷⁹

In 2008-2009, 35 percent of women and 23 percent of men in custody identified as "Aboriginal" despite only being 3 percent of the total Canadian population.⁸⁰ There is a higher prevalence of chronic health conditions among First Nations people compared to other Canadians. For example 19.7 percent, or one in five adults, was diagnosed with diabetes compared to 3.2 percent in Canada generally.⁸¹

Unlike Maori, significant numbers of First Nations still live in distinct territorial areas, on reserves that are smaller than the territories they traditionally held, and in regions where climatic conditions exist which few Europeans can endure all year round. However, like Maori, First Nations peoples increasingly live in cities with almost half the number now living in urban areas. At a governing level, the small percentage of First Nations people in the overall population is a barrier to their representation in government on a "one person one vote" basis. If representation was according to "nations" formed by those with Indian ancestry at the time of colonisation they would form the majority in Canada's Federal parliament. However, unless one travels to areas in Canada where First Nations people live on reserve lands, their existence as part of wider Canada is not obvious. Conversely, in the smaller geographical space of Aotearoa New Zealand, Maori live as part of an integrated society, are formally represented in central government, and are highly visible in the political arena. However, in both contexts, despite there being some quite significant differences, providing a system of taxation that upholds the integrity of indigenous community values will enhance the self-determination of the group.

⁷⁵ 2006 Census, n66.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

TAXATION OF FIRST NATIONS IN CANADA

Prior to the Canadian Constitution of 1867

Indigenous peoples made Canada their home centuries before Europeans arrived in the 15th Century.⁸² Consequently, the ancestors of the groups now referred to as First Nations began their relationship with the colonisers as independent peoples with authority over independent territories.⁸³ The desire of the English and French to gain territory occupied and held by these groups led to the negotiation of treaties.⁸⁴ Because First Nations saw themselves as independent and not subject to the imposition of colonial law⁸⁵ they also did not see themselves as being subject to colonial government taxation and, consequently, it was not referred to in any of the treaty texts.⁸⁶ In 1850, the Province of Canada passed an Act which provided in section 4:⁸⁷

That no taxes shall be levied or assessed upon any Indian or any person intermarried with any Indian for or in respect of any of the said Indian lands, nor shall any taxes or assessments whatsoever be levied or imposed upon any Indian or any person intermarried with any Indian so long as he or she shall reside on Indian land not ceded to the Crown, or which having been so ceded may have been again set apart by the Crown for the occupation of Indians.

According to John Borrows, although the exemption remained unchanged until the Indian Act of 1876,⁸⁸ under “the pretext of protecting Indians, the British systematically usurped Indian authority”⁸⁹ thereby diminishing the independence of First Nations and their capacity to govern themselves.

⁸² I Shin, *Aboriginal Law Handbook*, 2nd ed, Carswell Thomson, Canada, 1999, 3, states that “Europeans regarded it as a vacant continent since there were probably no more than 220,000 Indians” living there. Other estimates are that there were over 7-18 million Indians in all of North America at the time of colonisation. The latter estimate is stated by H Dobyns, *Their Number Became Thinned*, University of Tennessee Press, Knoxville, 1983, 42.

⁸³ “Authority over territory” is a problematic expression since it assumes European ideas of “sovereignty” and “state”. Also boundaries and land title have little meaning in a place where people have plenty of space and can move between territories according to climate and seasonal demands.

⁸⁴ Promises made in the Treaties signed with First Nations by the British and French and later confirmed in s35(1) Constitution Act, recognise that Treaty rights, based on nation-to-nation relationships, predate the Constitution.

⁸⁵ When Europeans made first contact, Aboriginal peoples existed as self-governing nations exercising effective control over geographical areas, trading and making war with other nations. According to various Indian leaders nationhood and self-government was never surrendered or taken by conquest. See Little Bear, M Boldt, J Long (eds), *Pathways to Self-Determination, Canadian Indians and the Canadian State*, University of Toronto Press, Canada, 1984, xv.

⁸⁶ J Borrows and L Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2nd ed, LexisNexis, 2003, 113.

⁸⁷ R Bartlett, “Taxation”, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, B Morse (ed), Carleton University Press, Canada, 1985, 584.

⁸⁸ Borrows and Rotman, n86 at 746. Through this Act the tax exemption for Indians was codified.

⁸⁹ *Pathways to Self-Determination*, n85 at xi.

The Indian Act 1876

Parliament's legislative authority over "Indians, and Land reserved for the Indians"⁹⁰ began with the Canadian Constitution Act of 1867 and then the Indian Act of 1876. First Nations peoples were recognised by various treaties as occupying certain territories⁹¹ and being separate nations in their own right.⁹² Canadian Indian policy at the time has been described by Richard Bartlett as:⁹³

'civilizing' the Indian population and achieving assimilation and integration as soon as possible, and ... protection of the Indians and their land from abuse and imposition ... until such time as being 'civilized', such protection was superfluous.⁹⁴

Subsequently, in 1876, Parliament enacted the Indian Act with the intention of turning what were essentially "sovereign nations"⁹⁵ into small communities" and making Canadian Indians legal wards of the state.⁹⁶

The Act set out the conditions that needed to be met in order for individuals to be recognized legally as 'Indians' and to empower the Crown to control the management of reserve land.

According to Imai Shin, the Indian Act had "two sometimes contradictory purposes – paternalism and assimilation – although both end up taking away control from First Nations".⁹⁷

⁹⁰ Constitution Act, 1867 (UK) 30 & 31 Vict.,c.3, reprinted in RSC 1867, App II, No. 5, s.91(24).

⁹¹ These territorial lands were quickly eroded and the Aboriginal peoples occupying them forced to accept elective systems which replaced traditional tribal governance. See *Pathways to Self-Determination*, n85.

⁹² Pre-confederation and post-confederation treaties are discussed in Borrows and Rotman, n86 and Bartlett, n87. The authors noted that written agreements between First Nations and the Crown created nation-to-nation relationships and treaty federalism. The treaties were concerned with the protection of inherent Aboriginal rights; the distribution of shared jurisdictions; territorial management; human liberties and rights; and treaty delegations. The authors further note that each of the parties believed they had secured their respective objectives; the Crown gained access to Indian lands and resources and First Nations secured the guarantee of the survival and protection of their Nationhood. This picture is skewed by First Nations having to fight for recognition of all of the above in the courts, parliaments (both provincial and federal), and sometimes physically with the government on their own lands. The relationship illustrates the paternalistic exploitation that indigenous peoples have complained of around the world rather than protection of First Nations and their territories. The Indian Act allowed the colonisers to eliminate traditional Indigenous political institutions by transforming self-governance into administrative structures for implementing policies and regulations aimed at "civilising", "integrating" and "assimilating". Ironically in recent years the very existence of the treaties, confirms in terms of international law, the standing of the Aboriginals as "peoples" having a distinct collective political character and rights.

⁹³ R Bartlett, *Indians and Taxation in Canada*, (3rd ed), 1 Saskatoon Native Law Centre, Saskatchewan, 1992, as cited in Borrows n86, 754.

⁹⁴ This attitude of "protecting the Indians from abuse and imposition" is what has been stated by Bartlett, n87, as leading to the taxation exemption for Indians and their lands. We can compare this approach to the New Zealand government policy towards Maori, which only gives a taxation exemption to Maori if a "charitable purpose" is present. It indicates a paternalistic approach towards Aboriginal peoples in both Canada and Aotearoa New Zealand.

⁹⁵ "Sovereign" as it is used here describes the native peoples' sense of their own Nationhood derived from having their own language, culture, shared tribal achievements and use of a particular territory. It is not the European notion of sovereign power emanating from the concept of ultimate state and Crown authority.

⁹⁶ See n3.

Under this Act the basic governmental unit is the “Band”,⁹⁸ which is governed by an elected Chief and Council and which has jurisdiction over an “Indian reserve”.⁹⁹ A First Nation is a “Band” under the Indian Act if it meets one of the following three criteria: it has a reserve; it has government trust funds for its use; or it has been declared to be a band by the federal government. Whether or not a person is an “Indian”¹⁰⁰ is also defined in the Indian Act along with a requirement under the Act for the keeping of a register of Indians.¹⁰¹ The Indian Act also contains restrictions on the alienation of reserve lands and individual real property interests.¹⁰² According to Richard Bird¹⁰³ across Canada there are more than 2,300 reserves held for 640 recognised First Nations. The Indian Act contains no provisions on how to create reserves¹⁰⁴ and federal policy has been developed in recent years on how to do this.¹⁰⁵

Tax Exemption on Indian Income Earned on Reserve

Section 87 of the Indian Act¹⁰⁶ “exempts real and personal property situated on reserve land from taxation where the owners of the property are either individual Indians or the collective First Nation”.¹⁰⁷ Since the section refers to an “Indian” and a “Band” it cannot apply to Aboriginal people who are not “Registered Indians”.¹⁰⁸

Section 90 of the Indian Act deems personal property acquired “with Indian moneys” or “given to Indians or to a band under a treaty or agreement” to be “always situated on a reserve” if the tax exemption given in section 87 is to apply. Because the Indian Act

⁹⁷ Shin, n82, 132.

⁹⁸ See n5.

⁹⁹ See n6.

¹⁰⁰ See n3.

¹⁰¹ Section 5 of the Indian Act.

¹⁰² Note the Maori equivalent. Te Ture Whenua Maori Act 1993 restricts the sale of Maori Land and establishes various types of trusts to hold and manage land. Part HF of the Income Tax Act defines a Maori Authority for tax purposes as including Maori Incorporations and Trusts established under the Act.

¹⁰³ R Bird, “The GST in Canada: plus Ça Change, Plus C’est La Meme Chose?” *Bulletin for International Taxation*, International Bureau of Fiscal Documentation, Amsterdam, (2009) 63, 414 at 415.

¹⁰⁴ In the past Reserves were established by Proclamation or under specific Treaties.

¹⁰⁵ Department of Indian and Northern Affairs Canada, Additions to Reserves Policy, <http://www.ainc-inac.gc.ca/ai/mr/is/urs-eng.asp>.

¹⁰⁶ Section 87 states: “(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the First Nations Fiscal and Statistical Management Act, the following property is exempt from taxation: (a) the interest of an Indian or a band in reserve lands or surrendered lands; and (b) the personal property of an Indian or a band situated on a reserve. (2) No Indian or band is subject to taxation in respect of ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property. (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.”

¹⁰⁷ See F Martin, B Morse and B Hocking, “The Taxation Exemption of Canadian Indians as Governments and Individuals: How does this compare with Australia and New Zealand”, (2011) *Common Law World Review*, 40, 119-143.

¹⁰⁸ “Registered” and “Status” Indians indicates Aboriginals who are registered or given status as Indians under the Indian Act 1876. See n3.

predated the imposition of the first federal income tax of 1917,¹⁰⁹ “personal property” was interpreted in *Nowegijick v The Queen*¹¹⁰ to include “income”. Further, as a result of *Williams v. Canada*,¹¹¹ a case that dealt with the tax exemption of unemployment insurance benefits, Revenue Canada not only interpreted the decision as determining income tax exemption but went on to develop guidelines as to when the exemption from income tax applied.¹¹²

Numerous Canadian cases have looked at tax exemptions on Indian income earned on reserve.¹¹³ The right is narrowly defined¹¹⁴ so that the exemption applies only to individual Indians and bands and excludes corporations or trusts.¹¹⁵

In June 1994, the Canada Revenue Agency [CRA] established guidelines to create certainty around the section 87 Indian Act taxation exemption.¹¹⁶

Recent case law, namely *Bastien Estate v Canada*¹¹⁷ and *Dube v Canada*¹¹⁸ has seen an alteration in the requirement of a connection to a recognised Indian reserve in order to obtain the preferential income tax exemption. In *Bastien* the Supreme Court of Canada held that property does not have to support a so-called “traditional way of life” to be tax exempt. Bastien’s residence was on the reserve as was the source of the capital which was then invested to earn interest for him. The fact that the interest revenue was produced in the “commercial mainstream” off the reserve was seen as a factor given too much weighting by lower courts and the Supreme Court decided that the investment income should benefit from the section 87 Indian Act exemption.

¹⁰⁹ The Income Tax War Act 1917 (Ca) 7 & 8 Geo, c28.

¹¹⁰ *Nowegijick v The Queen* [1983] 1 SCR 29; 83 DTC 5041.

¹¹¹ *Williams v Canada* [1992] 1 SCR 877.

¹¹² In December 1992 Revenue Canada announced that employment income would be assessed for taxation purposes unless 90% of the duties of employment are performed on the reserve; the employer is resident on a reserve and the Indian lives on the reserve; more than 50% of employment duties are performed on the reserve, and, the employer is an Indian band, tribal council or organisation dedicated exclusively to the social, cultural, educational or economic development of Indians.

¹¹³ Cases include *Nowegijick v The Queen* [1983] 1 SCR 29; 83 DTC 5041; *Williams v Canada* [1992] 1 SCR 877; 92 DTC 6320; *Shilling* 2001 DTC 5420 ; and *Bouvard v Canada* [2009] 2 CNLR 23, FCA; 2008 DTC 3015. More recent landmark cases are referred to in the paper below.

¹¹⁴ Under paragraph 81(1)(a) of the Income Tax Act and section 87 of the Indian Act, an individual Indian’s personal property situated on the reserve is exempt from tax. Employment income is exempt also if the employment services can be classified as being integral to the life of the reserve. The cases cited above demonstrate these principles.

¹¹⁵ For the exemption to apply to employment income until recently required a high degree of “connecting factors” to a reserve. As an example see *Nowegijick*, above n113, where the location of the employer on the reserve meant that the income paid to a status Indian employee was tax exempt regardless of where the service was performed. This has altered with the recent cases of *Bastien* and *Dube* referred to in n117 and n118.

¹¹⁶ The international accounting firm BDO makes this point in a publication on First Nations and the Canadian Tax Environment in which they quote a statement by the CRA: “It is important to note that the Guidelines were developed only as an administrative tool to assist taxpayers and CRA employees in working with a very broadly worded tax exemption ... they do not necessarily constitute a definitive test ... there may be situations where income may be taxable even though it appears to fall within one of the Guidelines.” www.bdo.ca/en/.../first-nations-and-the-canadian-tax-environment.pdf.4
www.bdo.ca/aboriginal.

¹¹⁷ *Bastien Estate v Canada* (2011) SCC 38.

¹¹⁸ *Dube v Canada* (2011) SCC 39.

Under the Indian Act there are limitations on the legal entitlement of individual non-Indians to live on, “use” or “occupy”¹¹⁹ reserve lands.¹²⁰ In 1988, the “Kamloops Amendments”,¹²¹ to the Indian Act created a distinction between reserve lands available for leasing, “designated lands”,¹²² and those surrendered absolutely for sale. As a result of the Kamloops Amendment to the Indian Act the land becomes “designated land” which the Crown then leases to the non-Indian entity. Because “designated lands continue to hold the status of reserve lands”,¹²³ income from these lands remains tax exempt under section 87 of the Indian Act.

As a separate legal entity, corporations cannot rely on this exemption even if all of its shareholders are Indians and the corporation is located on a reserve.¹²⁴ However the exemption will apply to money from either a land claim settlement or a reserve development received by a band that has established a trust.¹²⁵ According to Martin et al,¹²⁶ First Nations are entering into Impact Benefit Agreements [IBAs] with resource companies for major development projects in order to achieve greater self-determination and economic development, with the contracting company providing or funding training, education, employment and business opportunities in return for First Nation support of the project. The trust that is established receives the compensation and monetary assistance provided by the IBA and because it is considered income of the First Nation it will be exempt from tax.¹²⁷

¹¹⁹ “Occupy” is used here to describe an individual or corporation moving onto Indian reserve land for business purposes, often to exploit natural resources that are located there. Such reserve land is also referred to as “surrendered lands” under a lease agreement between the individual business or corporation and the band council with authority over the reserve land.

¹²⁰ Martin et al, n107 at 133.

¹²¹ It was the action of Chief Manny Jules of the Kamloops Indian Band that led to the legislative change made to section 83 of the Indian Act to clarify First Nation jurisdiction. The Kamloops Band had lost a court case challenging municipal taxation of their tenants even though the City of Kamloops provided no services to designated lands, which were held to be in any event outside the jurisdiction of the Band Council. The distinction gave Band Councils regulatory and taxing jurisdiction over their leased lands. By the same amendment, leasehold interests in designated lands were made mortgageable as an exception to the statutory rule that reserve lands cannot be mortgaged (section 89).

¹²² “Designated lands” means “a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;”

¹²³ Martin et al, n107 at 134.

¹²⁴ Ibid. According to the authors it is proposed by the Canadian Federal government that s149 (1)(d.5) of the Income Tax Act will be amended to make corporation income exempt where at least 90 percent of its shares are owned by a municipal or public body performing government functions. Where a First Nation is treated as a public governmental body they also will be entitled to the tax exemption. The case of *The Queen v Kinookimaw Beach Association* (1979) 102 DLR (3d) 333, held that the definition of “Indian” does not extend to corporations, even where the shareholders are Indians.

¹²⁵ Canadian tax law provides that income from trust property is beneficiary income and it is the beneficiaries who are liable for tax. If the beneficiaries are living on reserve any income they receive from the trust will be tax exempt.

¹²⁶ Martin et al, n107 at 135.

¹²⁷ Section 87 of the Indian Act and section 5 of the First Nations Fiscal and Statistical Management Act operate to exempt from taxation income derived by an Indian or a Band on reserve land.

Property Tax

First Nations have developed property taxation powers through the Kamloops Amendments made to the Indian Act and the First Nations Fiscal and Statistical Management Act in 2005 [FNFSMA].

Property tax¹²⁸ is a major revenue source for provincial and local government within Canada, raising annually almost \$40 billion¹²⁹ and generating about 10 percent of all government revenue. In 2008, property taxation accounted for 39 percent of local government revenue.¹³⁰ In Canada, this taxation covers the cost of local services that are not met by the federal or provincial governments, such as water and sewerage systems, police and fire protection, rubbish collection, road and lighting improvements, and parks, recreation and cultural facilities.¹³¹

Interestingly, First Nations taxation can be traced back to before the appearance of Europeans, when paying tribute for occupying or using another's territorial lands was normal practice. This form of tax was a concession given in exchange for a privilege. Another type of taxation occurred through wealth distribution ceremonies performed amongst bands such as potlatch and giveaway dances.¹³²

In 1884 the Indian Advancement Act was passed seeking to replace government by chiefs-in-council with government-by-council and allowing the new statutory "Indian Band Governments" the Federal power to raise internal funds.¹³³ However, as previously stated, it was not until the Kamloops amendment to section 83 of the Indian Act and then the passage of Bill C-115 that First Nations were given broader tax powers within their reserve lands.¹³⁴ The amendment allowed First Nations to establish their own taxing jurisdictions, create economic development opportunities, and provided a

¹²⁸ This tax is on real property such as land and improvements on the land. "First Nations On Reserve" taxable properties include residential leases, buildings, commercial leases, farming permits, pipelines, transmission lines, production facilities, towers and railways.

¹²⁹ Statistical Information from the First Nations Tax Commission website retrieved on 18 May 2012 from http://www.fntc.ca/index.php?option=com_content&view=article&id=39&Itemid=39

¹³⁰ *First Nations Real Property Taxation Guide*, 2nd edn, 2011, 7, http://www.fntc.ca/dmdocuments/General/property_taxation_guide_2011.pdf [FN Taxation Guide].

¹³¹ Ibid.

¹³² Traditionally at potlatch gatherings, a family or hereditary leader hosts guests in their family's house and holds a feast for their guests. By using the ceremony to redistribute and receive gifts, hierarchical relations within and between clans, villages, and nations, are observed and reinforced. The status of any given family is raised not by who has the most resources, but by who distributes the most resources. The hosts demonstrate their wealth and prominence through giving away goods. Each nation or tribal grouping has its own way of practicing the potlatch with diverse presentations and meaning but the main purpose is still the redistribution of wealth. See <http://en.wikipedia.org/wiki/Potlatch> and <http://www.thefreedictionary.com/potlatch>.

¹³³ According to Bartlett, n87, the federal government had to consider whether the Band was "advanced" and therefore "fit" to assess and tax lands of enfranchised Indians. No Indian Band was considered fit to exercise this power until 1951 when it was reintroduced alongside the power to license businesses.

¹³⁴ As the Supreme Court of Canada noted in *Canadian Pacific Ltd v Matsqui Indian Band* [1995] 1 SCR 3, para 18, the objective in creating the Indian taxation powers was "to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserves".

basic tool for governance.¹³⁵ At the time, in the House of Commons, the then Minister of Indian Affairs and Northern Development stated:¹³⁶

One of the most important by-law powers that bands need is their power to tax use of their land. That brings me to the second purpose of these amendments, which is to establish clearly that band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land. Such taxation power is obviously indispensable to any form of modern government. Some bands may not wish to use this power, but it must be there for bands which wish to exercise it.

The Kamloops Amendments modified the definition of “reserve” to include “designated lands”.¹³⁷ The Amendments led to litigation to determine what lands came within the definition of a reserve as “designated lands”. In 1997, the Court in *St Mary’s Indian Band v Cranbrook*¹³⁸ determined that only lands surrendered for lease came within the definition and not land surrendered for sale. The position was clarified in *Osoyoos Indian Band v Oliver (Town)*.¹³⁹ The facts of the case were that in 1925 an irrigation canal was constructed in British Columbia on a strip of land that bisected the reserve concerned. In 1957, a federal Order-in-Council enacted pursuant to section 35 of the Indian Act was adopted allowing the taking of the lands by the province, which subsequently registered a certificate of indefeasible title in its name. The Supreme Court concluded that the lands where the irrigation canal was built were still in the reserve as “designated lands” and therefore subject to band taxation under section 83 (1)(a) of the Indian Act. The Court took the view that the interpretation which least impaired the Indian interests was to be preferred.¹⁴⁰

First Nations Fiscal and Statistical Management Act

The First Nations Governance Act (Bill C-7),¹⁴¹ and the First Nations Fiscal and Statistical Management Act (Bill C-19),¹⁴² were tabled as a package of band governance provisions.¹⁴³ Both Bills received strong opposition from the Assembly of First Nations¹⁴⁴ and led to a modified Bill C-19, which became the First Nations Fiscal and Statistical Management Act 2006 [FNFSMA].¹⁴⁵

¹³⁵ *FN Taxation Guide*, n130 at 10.

¹³⁶ House of Commons Debaters, vol. XIII, 2nd session, 33rd Parliament (2 June 1988) at 16047 as cited in B Crane, A Brian, R Mainville, M Mason, *First Nations Governance Law*, LexisNexis, 2008, 99.

¹³⁷ See note 122, Indian Act definition.

¹³⁸ [1997] SCJ No. 19, [1997] 2 SCR 657.

¹³⁹ [2001] SCJ No. 82, [2001] 3 SCR 746.

¹⁴⁰ Crane et al, n136 at 103.

¹⁴¹ Bill C-7 is an Act respecting leadership selection, administration and accountability of Indian bands and with the purpose of making related amendments to other parliamentary Acts. 2nd Sess., 37th Parl., 2002.

¹⁴² Bill C-19 is an Act providing for real property taxation powers of First Nations. It creates a First Nations Tax Commission, First Nations Financial Management Board, First Nations Finance Authority and First Nations Statistical Institute and makes various amendments to other Acts, 2^d Session, 37th Parliament, 2002.

¹⁴³ Crane et al, n136 at 104.

¹⁴⁴ In November 2002 the Assembly of First Nations passed a resolution (AFN Resolution 30/2002) rejecting Bill C-19 as a violation of Treaty and Aboriginal rights. Bill C-7 lapsed after failing to get adequate support in Parliament.

¹⁴⁵ First Nations Fiscal and Statistical Management Act, SC 2005.

The FNFSMA set out a new comprehensive taxation regime in regard to property taxation.¹⁴⁶ Indian bands were also given the option of levying consumption taxes on their reserves through the Budget Implementation Act 2000¹⁴⁷ and the First Nations Goods and Services Tax Act 2003.¹⁴⁸

The Budget Implementation Act 2000 allows bands to make by-laws imposing a direct tax on supplies of alcoholic beverages, fuel, and tobacco products made on reserves. The rate imposed is the same as that imposed by the Excise Tax Act 1985.¹⁴⁹ The imposition of this tax prevails over the tax exemption allowed under section 87 of the Indian Act and ensures that all sales of the above products on reserve, to both Indians and non-Indians, are taxed. The tax is collected by the government in agreement with the Band Council.¹⁵⁰

The First Nations Goods and Services Tax Act 2003 [FNGST] is very similar to the Budget Implementation Act 2000. It transfers to Bands that choose to participate in this form of taxation, the “authority to levy for their own purposes a tax equivalent to the GST on sales made on their reserve lands”.¹⁵¹ As with the Budget Implementation Act 2000 this tax also overrides the tax exemption found in section 87 of the Indian Act, so that both Indians and non-Indians are taxed by the participating Band.¹⁵²

The FNFSMA provides a new opt-in property tax regime without repealing the property tax provisions contained in section 83 of the Indian Act.¹⁵³ This gives First Nation bands the option, subject to approval from the Minister,¹⁵⁴ to develop a property taxation regime under this legislation rather than under section 83 of the Indian Act.¹⁵⁵ While section 83 is an older provision containing basic property tax tools for a First Nation band to use, the FNFSMA provides additional powers and access to debenture financing.¹⁵⁶ A Council wanting to make taxation laws under the FNFSMA “must first make a law respecting the financial administration of the band and have that law approved by the First Nations Financial Management Board”.¹⁵⁷ There is also a requirement for the law to be approved by the First Nations Taxation Commission [FN Tax Commission].¹⁵⁸

¹⁴⁶ Ibid, c9.

¹⁴⁷ Budget Implementation Act, SC 2000, c14.

¹⁴⁸ First Nations Goods and Services Tax Act, SC 2003, c15, Part 9.

¹⁴⁹ Excise Tax Act, RSC 1985, cE-15.

¹⁵⁰ Crane et al, n136 at 110.

¹⁵¹ Ibid, 111.

¹⁵² As of November 2011, 23 Aboriginal governments have implemented the FNGST and are receiving group remittances of approximately \$12 million per year.

¹⁵³ Crane et al, n136 at 104.

¹⁵⁴ The Minister of Indian Affairs and Northern Development.

¹⁵⁵ Crane et al, n136 at 104.

¹⁵⁶ The establishment of the First Nations Financial Management Board [FNFMFB] is to assist First Nations with all aspects of financial management. Previously, in 1995, a federally incorporated non-profit corporation called the First Nations Finance Authority [FNFA] was established to assist First Nations with financing for capital infrastructure development and capital assets for the provision of services on reserve land. The FNFMFB provides an overseeing role and ensures that financial standards are met when First Nations borrow money through the FNFA.

¹⁵⁷ Crane et al, n136 at 104.

¹⁵⁸ Ibid.

Prior to the establishment of the FN Tax Commission it was the Indian Taxation Advisory Board [ITAB] created in 1989 that made recommendations regarding the approval of Band real property taxation bylaws as authorised under section 83 of the Indian Act.¹⁵⁹ The ITAB had the mandate to promote the development and implementation of First Nation local property tax and ensure its overall national integrity. ITAB assisted First Nations to achieve “a measure of jurisdictional equality with adjacent municipal and regional governments”.¹⁶⁰

Once the tax model under section 83 of the Indian Act had been approved, the ITAB began advocating a new regulatory framework in order to strengthen the tax powers of First Nations. This led to the development of the FNFSMA and the creation of the FN Tax Commission. The FN Tax Commission acts as:¹⁶¹

an independent agency ... with the power to approve local taxation and expenditure laws made pursuant to the First Nations Fiscal and Statistical Management Act, to maintain a registry of such laws and of financial administration laws of participating bands, to approve band laws respecting the borrowing of money from the First nations Finance Authority and to provide mechanisms for dispute resolution.

Once approval is given by the FN Tax Commission to a local taxation or expenditure law made by a First Nations Band, the law will come into force without Ministerial approval. The FN Tax Commission is required to report annually to the Minister of Aboriginal Affairs and Northern Development.

It is also possible for an Aboriginal group that is not a Band defined under the Indian Act, but which is party to a Treaty, Land Claim or Self-Government Agreement, to come under the FNFSMA.¹⁶² The FNFSMA provides First Nations with the necessary legislative tools to raise revenue so they can meet the increasing demand from their communities for government infrastructure and services.¹⁶³

According to the FN Tax Commission there are 194 First Nations exercising property tax powers, with revenue that ranges from a few thousand dollars per year to millions of dollars per year.¹⁶⁴ In 2011, First Nations raised \$70 million annually and used the income generated to provide local public services on reserve lands.¹⁶⁵ The ability to impose the above taxes on First Nation Reserves gives Band Councils that choose to

¹⁵⁹ Ibid, 105.

¹⁶⁰ *FN Taxation Guide*, n130. This may be something for Maori to think about in developing the post treaty settlement governmental models further. See N Tomas, “Coming Ready or Not, Emergence of Maori Hapu and Iwi as a Third Order of Governance in Aotearoa New Zealand”, *Te Tai Haruru Maori Journal of Legal Writing*, Vol 3, Nga Pae o te Maramatanga, Auckland, 2011, 14-57, which discusses how legislation and Maori cultural principles and practices are being combined to achieve more equitable outcomes for hapu and iwi within their traditional territories.

¹⁶¹ Crane et al, n136 at 106. Note that c9, sections 31-34 of the First Nations Fiscal and Statistical Management Act, SC 2005, outlines the role of the Tax Commission.

¹⁶² Section 141.

¹⁶³ There is a great deal more to discuss about the role of the FN Tax Commission, including how property taxes are levied and collected, and the role of the First Nations Tax Administrator and Assessor.

¹⁶⁴ In 2011, a total of 134 First Nations had enacted bylaws under section 83 of the *Indian Act* and another 60 Bands under the FSMA. *Fact Sheet-Taxation by Aboriginal Governments* produced by the Aboriginal Affairs and Northern Development Canada at <http://www.aadnc-aandc.gc.ca/eng/1100100016434/1100100016435>.

¹⁶⁵ *FN Taxation Guide*, n130.

participate, an economic, and, potentially, autonomous future. By First Nation Bands raising their own tax revenues on “all-on reserve” economic activities and then using this revenue on their land reserves, there is the possibility of true economic independence and the ability to move away from dependence on the federal government.¹⁶⁶

SELF-DETERMINATION OF INDIGENOUS PEOPLES

What is self-determination?

Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples 2007 confirms the fundamental right of indigenous peoples to self-determination.¹⁶⁷ Article 3 states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Nin Tomas¹⁶⁸ describes self-determination as “a fundamental principle of international human rights law that is rooted in changing conceptions of human experience”.¹⁶⁹ She states:¹⁷⁰

that self-determination is at heart an open-ended enabling principle of an emancipatory kind whose modern application is two-fold. While it is still used in its historical sense to justify secessionist movements before and after they occur – that is, whenever old states disintegrate and new ones emerge to replace them – its more common modern usage now is as an external constraint that has been placed on state action vis-a-vis certain internationally recognized self-determining groups.

At a “popular” level, self-determination has been loosely defined as the individual right to the “free choice of one’s own acts without external compulsion”.¹⁷¹ However, when relating the term to indigenous peoples it is more appropriate to apply self-determination to them as groups rather than individuals, because it is a collective group right from which individuals can benefit.¹⁷²

¹⁶⁶ M Boldt argues that the Indian benefit system creates a significant inequity between on-reserve and off-reserve employment and therefore greater dependency. He believes that there is a problem in a “grant economy” and that a strategy based on massive Canadian government support will not liberate Indians from their state of economic dependence. He argues that the surrender by the Canadian government of its proprietary claim to Indian income-tax revenues and the passing over of this right to First Nation Bands, as long as all income earned by their members both on and off reserve is taxed by the band, would create a tax-neutral status for Indians and have the positive effects of preventing Indians seeking employment off-reserve, creating income-tax parity between Indians and other Canadians with regard to federal rates of income tax, encouraging reserve-based economic development and allowing a movement back to economic self-sufficiency and independence of Indians in the wider provincial and federal economies. See M Boldt, *Surviving as Indians The Challenge of Self-Government*, University of Toronto Press, Canada, 1993.

¹⁶⁷ Taken from http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

¹⁶⁸ N Tomas, *Indigenous Peoples and the Maori: The Right to Self-Determination in International Law – From Woe to Go*, [2008] *NZ L Rev*, 639-683.

¹⁶⁹ *Ibid*, 639.

¹⁷⁰ *Ibid*, 640.

¹⁷¹ <http://en.wikipedia.org/wiki/Self-determination>.

¹⁷² Tomas, n168 at 657.

There are sound reasons for promoting self-determination in the narrower sense of enhancing group “self government” for limited economic and social reasons as well as in the broader “indigenous sense” outlined as a complete framework under the United Nations Declaration on the Rights of Indigenous Peoples. This article, and the work undertaken by Stephen Cornell and others as part of the Harvard Project on American Indian Economic Development studies, deals with the former and largely accepts the status quo within which it is occurring. It does demonstrate, though, that self-determination and economic prosperity are inextricably linked and provide for better indigenous governance because leaders are more accountable to members of the community and their decisions are more likely to be in tune with the cultural values of the community.¹⁷³ This achievement is self-determination with a small “s”; that is, one that is constrained by legislatively imposed external factors such as the Indian Act in Canada and Te Ture Whenua Maori Act in Aotearoa New Zealand.

The Harvard Project research shows that self-government cannot be achieved without an economic base. Access to sources of revenue is essential if a group is to be self-governing and have the ability to self-determine its economic future. This is where taxation measures can have either a negative or positive effect, and why tax policy should strive to achieve equality of outcome, while also providing cultural recognition and certainty.¹⁷⁴ It provides a small window into the bigger framework of Self-Determination that is the aspiration set out in Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. Clearly under the Declaration, and in the view of many indigenous peoples,¹⁷⁵ self-determination is a fundamental principle and right of international law. Within Aotearoa New Zealand, the Maori Authority concessionary taxation regime has allowed Maori to take greater control of their asset base and to develop it on behalf of their collective owners.¹⁷⁶ However there are often difficulties in balancing the cultural dynamics of an iwi and governing a major corporate

¹⁷³ S Cornell et al, *The state of the Native nations: conditions under U.S. policies of self-determination: the Harvard Project on American Indian Economic Development*, Oxford University Press, New York, 2008, 121-127.

¹⁷⁴ A good tax policy framework is discussed in, Tax Working Group, *A Tax System for New Zealand's future*, Victoria University, Wellington, January 2010, and concludes that a good tax system should be equitable, neutral and provide certainty. Cultural attunement however does not fit with principles of neutrality unless one accepts that the playing field is not neutral and acknowledges that to achieve true neutrality within tax for all cultural groups within a society will require different tax policies to ensure culture is recognised and enhanced. There is justification for governments to leave aside “neutrality” because such a policy stance works against the developmental strategies that the government may be attempting to implement within the developing economy. See J Horne, “The Role of Tax Reform in the Development of Pacific Island Economies”, 1993, 10 *Australian Tax Forum*, 347 and J Sneed, “The Criteria of Federal Income Tax Policy”, *Stanford Law Review*, Vol 17, April 1965, 572.

¹⁷⁵ Little Bear et al, n85 at 159-160. Del Riley states, “The other thing that I tell Canadians, when they ask me what Indians want, is that we seek basic human rights ... sometimes it is termed ‘self-determination’. Our quest for self-determination includes controlling those institutions that affect our lives. That is what Indian people are saying.”

¹⁷⁶ *FN Taxation Guide*, n130; The total 2005/2006 Maori-owned commercial assets have been estimated at nearly \$16.5 billion.

entity.¹⁷⁷ Such balancing can be made more difficult when the iwi group is compelled to adopt a particular legislative entity structure.¹⁷⁸

Greater self-government for Maori is thwarted when the government requires an iwi or Maori organisation to adopt corporate structures that the government understands but which do not meet the cultural needs of the iwi as a group.¹⁷⁹ Part HF of the ITA 07 clearly defines what constitutes a Maori Authority in established Western terms and sets strict criteria that must be met before any structure can be implemented by an Authority.

The Maori Authority taxation regime is a response by government to the needs of Maori groups running land-based businesses for the benefit of a select group of collective owners who are still fortunate enough to hold Maori land.¹⁸⁰ This has been expanded to include hapu and iwi who are beneficiaries of Treaty fisheries and other settlements.¹⁸¹ These concessions are allowing Maori greater control over an expanding economic resource base, particularly when the Maori Authority structure is combined with other business structures. However Maori Authority governance responsibilities can clash with the demands of the collective owners for greater accountability to them for safeguarding cultural aspects and retaining resources for future generations, which causes difficulties for the governors of the Maori Authority, particularly when trying to raise external finances.¹⁸²

By way of comparison, the taxation measures applying to First Nations in Canada also reflect a difficult history of government policies of assimilation and alienation of territory through legislation such as the Indian Act. It can be argued that as Nations in their own right, with defined territories over which they still have notional control, Bands on Reserves should be able to impose their own taxes and have that right respected externally by the provincial, territorial and federal governments. However, many Reserves have been diminished significantly from the large territorial areas they were at the time of colonisation to much smaller territories, by those governments. Thus the political aspect of unconstrained “Self-Determination” under Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples has already been significantly undermined.

¹⁷⁷ J Gardiner, “Getting Past Post-Settlement, Governing and Running Maori Entities”, 21 August 2009, New Zealand Law Society Intensive, Wellington, at 26-28, available at www.lawyerseducation.co.nz.

¹⁷⁸ Ibid. Gardiner states that when Ngati Awa attempted to retain the basic form of Maori Trust Board but replace accountability to the Minister of Maori Affairs with accountability to Iwi members, the Crown refused to accept the change.

¹⁷⁹ Ibid. Another example of the patriarchal control of the Crown over Iwi is that owners of Maori freehold land are restricted to using the land administration structures contained within Te Ture Whenua Maori Act 1993.

¹⁸⁰ A Sharp, “The History of the Taxation of Maori Authorities in New Zealand: A unique reflection of law and public policy working together?”, *Taxation issues*, A Maples and A Sawyer (eds), Existing and Emerging, Centre for Commercial and Corporate Law, Christchurch, 2011.

¹⁸¹ Since 1992 under the Treaty of Waitangi settlement process, historic claims have been negotiated and settled. Settlements usually include an historical account, acknowledgment of Crown breaches of the Treaty of Waitangi and a Crown apology. Cultural, financial and commercial redress are negotiated and legislation is passed by parliament as settlement of the historic claim. Since 1992, settlements include the return of, or a share in, or shared management of, lands, fisheries, forestry, lakes, rivers and other culturally important assets or rights.

¹⁸² The same concerns are true for the leaders of First Nation Bands in Canada. See Borrows, n86.

The reduced asset base, like the land holdings for iwi groups in Aotearoa New Zealand, makes it impossible for both groups to achieve self-determination without first building up their economic resources. The fact that both groups' membership is based on selective membership that is legislatively defined, is further exacerbated in Aotearoa New Zealand by the fact that some groups are recognised as large traditional iwi, while others are not, and in both countries by the fact that large numbers of their members live out of territory and in poor urban social conditions. These individuals have not only lost links to their tribal base through past land legislation which predates Te Ture Whenua Maori Act and the Indian Act, but also constitute a significant portion of the negative statistics outlined earlier in this article.¹⁸³

The ability to impose property taxes on their Reserves is a taxation measure for First Nations, which increases their ability to self-govern.¹⁸⁴ Controlling one's economic base is the way to also control one's destiny and measures introduced by legislation such as the FNFSMA, the Budget Implementation Act and the Goods and Services Tax Act will provide First Nations with the ability to increase their ability to govern in a way that suits their community members, albeit still within the constraints of the Indian Act.

CONCLUSION

This article set out to investigate whether taxation systems adapted by the government for use by Indigenous peoples in Aotearoa New Zealand and Canada restricted or encouraged Maori and First Nations aspirations for self-determination. "Self-determination" was defined as creating circumstances that enabled an indigenous community to achieve greater economic, political and cultural autonomy and to improve their socio-economic conditions. In comparing Maori with First Nations, some things are obvious. The membership of both groups is determined by legislation: we are not looking at Maori generally, but only at those covered by specific legislation or recorded as being members of specific hapu and iwi who hold particular resources; and in Canada although we are looking at a wider resource base, the beneficiaries are a relatively small group of Band Indians who are registered as Status Indians and who live on designated reserve lands. Both of these factors take the examination out of the Article 3 type, unconstrained, Self-Determination aspirations of the United Nations Declaration on the Rights of Indigenous Peoples, which deals with the broad aspirations of indigenous peoples as a generic group who are distinct from those who colonised them, and presumes the existence of a clear territory within which this can be achieved. This article is more humble in approach: it looks at how improving self-government

¹⁸³ Stephen Cornell states, "if central governments wish to perpetuate Indigenous poverty, its abundant ills and bitterness, and its high costs, the best way to do so is to undermine tribal sovereignty and self-determination. But if they want to overcome Indigenous poverty and all that goes with it, then they should support tribal sovereignty and self-determination, and they should invest in helping Indigenous peoples build the governing capacity to back up sovereign powers with effective governments of their own design." S Cornell, "Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States", Native Nations Institute for Leadership, Management and Policy, *Harvard Project on American Indian Economic Development*, Arizona, 2006, 28. Clearly poverty is expensive with costs not only through social service provision but also in lost resources where people are trapped in dependency instead of contributing to their own and other societies.

¹⁸⁴ Boldt, n166, and Cornell, n183.

practices within the narrow confines set up by each government to provide concessions that do not challenge the political and legal status quo of each country, is being achieved. While this can be viewed as “divide and rule”, it can also be argued, as this article does, that it improves the economic control that a number of indigenous groups have over their resource-bases in both countries, irrespective of the size of that base.

The taxation rules relating to Maori Authorities have undergone various changes since 1939 when a new framework for the taxation of Maori Authorities was instigated to enable Authorities to make a full contribution to the national economy. The increasing number of organisations and businesses managing collectively-held Maori assets has necessitated the creation of special Maori Trusts for both business and charitable purposes operating on collectively owned lands. The settlement of Maori claims under the Treaty of Waitangi and the creation of Mandated Iwi Organisations has expanded the iwi resource base and necessitated legislation to bring them within the ambit of Maori Authorities who are administering newly acquired economic resources. MACA eliminates double taxation. The 17.5 percent tax rate currently imposed on Maori Authorities aligns with the marginal tax rates of the majority of Maori Authority members. And finally, the decision to both relax and broaden the “public benefit” rule to include marae whose activities meet “charitable purpose” requirements, not only recognises that these organisations make a charitable contribution to Aotearoa New Zealand society, but also demonstrates that cultural considerations are a factor to be considered in any tax policy approach. These concessions encourage Maori self-determination, in the sense that they include a degree of cultural, economic, and political recognition that earlier assimilationist approaches actively denied.

The negative aspect of the Maori Authority regime is that all the measures taken to date can be argued as amounting to little more than giving Maori the fair deal that they always should have had. As such they are not concessions at all but the undoing of past injustices that has taken a very long period of time to achieve. The new taxation regime is a very small window in the framework of a house whose overall design is determined and controlled by the government, to whom Maori are always answerable. All approved Maori Authority entities must be based on western legal company or trust structures, rather than structures that represent the good governance cultural practices of the people they represent. This control makes them “Crown agents” rather truly self-governing entities who are implementing their own cultural values and practices. Crown oversight conflicts with, and overrides, the duty Maori Authorities owe to their Maori membership. As the people who are directly impacted, Maori beneficiaries require Maori Authorities to protect their resources for future generations in accordance with Maori traditional principles, and hold them accountable to a different set of expectations.

In Canada, First Nations were initially recognised as having autonomy over their reserve lands through negotiated treaties. Although this autonomy has been heavily affected by legislation, the recent introduction of the FNFSMA, the creation of the FNTC and the consequential participation by First Nations in the property tax system, has increased the self-government capacity of First Nations. 194 First Nations currently participate in the property tax system and more will enter the process in order to benefit from the economic returns that it now offers. These advantages include giving First Nations greater economic parity in the wider society because the gathering of taxation demonstrates not only a commitment to self-government but also avenues for increased

personal responsibility through self-financing.¹⁸⁵ It can also enhance the legitimacy of a government within its own community,¹⁸⁶ and the collection of even modest taxes and fees facilitates a greater political consciousness among community members, encouraging citizens to take a greater interest in the decisions and trade-offs their governments make, and allowing greater appreciation of the cost of providing services within their own communities. Self-reliance promotes a culture of accountability to the community that is qualitatively different from the accountability that exists when all funds are provided from sources external to the community.¹⁸⁷ Finally, by taking control of decision-making, establishing effective and legitimate governing institutions, strategically using natural resources, education, location and other assets, indigenous groups are able to achieve successful and sustainable economic development.¹⁸⁸

On the negative side, government policies of assimilation and integration, along with loss of territory and the imposition of the Indian Act still exists. The tax exemption applying through section 87 of the Indian Act is limited by the exclusion of those who are not “status” or “registered” Indians and the way “status” is inherited. The small size of many reserves makes it difficult to accommodate new members. In Aotearoa New Zealand, hapu and iwi membership is not restricted and iwi groups determine an individual’s links through whakapapa (ancestry). However, no taxation exemption provisions apply unless one is a member of a “Maori Authority” as discussed earlier in this article.

The taxation measures operating in both Aotearoa New Zealand and Canada, for Maori and First Nations respectively, are only a first step in the process of achieving greater self-governance for these peoples. Both governments accept that differential taxation measures can assist indigenous groups to develop their resource asset base for the benefit of the whole of society, and are willing to recognise cultural differences which enable that to occur.

Is this self-determination? The Canadian approach permits First Nations to administer a taxation regime on reserved lands that are ultimately owned and controlled by the Federal government. It provides the opportunity to raise revenue and determine how it is spent until the rules are changed externally by the Federal government. Is something that is so circumscribed by legislation really free choice without external compulsion? Economic independence leading to full self-determination is difficult to achieve on reserves that have been diminished in size from the large territorial areas that existed at the time of colonisation, especially when 45 percent of the population lives off the reserve.

For Maori, the ability to impose taxation is frustrated by the lack of reserve lands as exists in Canada, with all the members of the indigenous community living and working on them to achieve economic sustainability. However, Maori have divided up the whole of Aotearoa New Zealand into territories over which hapu and iwi claim exclusive areas of territorial authority or “mana whenua”. This provides other opportunities for

¹⁸⁵ A Maslove and C Dittburner, “The Financing of Aboriginal Self-Government”, *Aboriginal Self-Government in Canada*, J H Hylton (ed), Purich Publishing Ltd, Saskatchewan, 1999, 399.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid, 400.

¹⁸⁸ Cornell et al, n173 at 121.

revenue generation by hapu and iwi who hold resources such as fishing quota, thermal energy, mineral waters, petroleum and coal reserves on their lands. The positive contribution to the economy of Aotearoa New Zealand that is being made by Maori indicates that the settlement of Treaty claims and the concessionary Maori Authority taxation regime have strengthened the economic independence of some groups. It is one small, but nevertheless important, step towards achieving economic self-determination within a governance structure that is imposed by the dominant culture.

Thus, in my view, taxation is a useful tool that can assist indigenous peoples not only to build their own economic and governing capacity, but also to become effective contributors to the whole society. These benefits should not be discounted, even though the current taxation regimes that exist in both Aotearoa New Zealand and Canada do not provide for the full, group-held article 3, Self-Determination aspirations of indigenous peoples that are contained in the United Nations Declaration on the Rights of Indigenous Peoples.

THE UNSPOKEN GENOCIDE: CANADA'S RESIDENTIAL SCHOOLS AND AUSTRALIA'S STOLEN GENERATION

Zachary Fargher*

INTRODUCTION

This article examines the social impact of colonial legislation and government policies for the establishment and running of Residential Schools in Canada and Australia in the 19th and 20th centuries. During this period, governments in both countries removed indigenous children from their communities and placed them in Residential Schools with devastating, long-term effects.¹ In Australia, the Human Rights and Equal Opportunities Commission Report, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, coined the phrase “stolen generation” as a moniker for their experiences. In Canada, the devastation wrought has been documented in the *Interim Report of the Truth and Reconciliation Commission*² published in 2012 as the result of an ongoing investigation into the impact of Residential Schools. Concern over lack of continuing government funding has put the Canadian investigation in a precarious position, but damning evidence already compiled by the Commission places it on par with Australia.

WERE RESIDENTIAL SCHOOLS INSTITUTIONS OF “GENOCIDE”?

This article assesses the impact of Residential Schools on indigenous communities against the *actus reus* and *mens rea* requirements of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide 1948 [Convention on Genocide].³ Australia’s culpability is assessed under Article 2, subsection (e): Canada’s culpability is assessed under Article 2, subsection (c).

Article 2 of the Convention on Genocide defines “genocide” as:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;

* Zachary Fargher is an LLB Hons student in the Faculty of Law at the University of Auckland, Aotearoa New Zealand.

¹ Human Rights and Equal Opportunities Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997 [*Bringing them Home*].

² Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Interim Report*, Manitoba, 2012 [*TRC Interim Report*].

³ The Convention on the Prevention and Punishment of the Crime of Genocide, was adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 [Convention on Genocide].

(e) forcibly transferring children of the group to another group.

Culpability under subsections (c) and (e) does not preclude culpability under other subsections. Legal liability in both countries is narrowed, however, by the fact that much of the residential school story occurred before the Convention on Genocide was ratified by either Australia or Canada. And customary international law, which could have bridged the gap in time and allowed for it to have retroactive effect, has also been precluded by domestic litigation in both countries.⁴ Thus, although the Convention on Genocide provides the strongest international legal definition of genocide, it cannot be used as a tool for domestic prosecution. This is not to say, however, that all of the requirements of the Convention are not fully met in both countries.⁵ Nor does it reduce the continuing devastating social impact on indigenous groups that makes the retelling of their stories necessary in order for them to move forward.

AUSTRALIA'S RESIDENTIAL SCHOOLS

For one hundred years, between 1869 and 1970, Aboriginal children throughout Australia were able to be forcibly removed from their communities and placed in state schooling institutions. Initially, this was accomplished via section 51 of the Australian Constitution, which granted states power to create separate legislation to deal with Aborigines.⁶ Children were removed from their homes in each state under protection and welfare Acts. These Acts included the Aborigine Protection Amending Act 1915 (NSW)⁷ and the Aboriginal Protection Act 1896 (VIC).⁸ In 1967, the power was reclaimed by the Federal government.⁹

Residential Schools were state funded and administration was split between church authorities and government officials.¹⁰ Most children who were taken were never returned to their communities and home visits were either actively discouraged or openly prohibited. Instead, children were institutionalised until they were considered to be old enough to enter mainstream, white, Australian society.¹¹

⁴ *Malbeouf v Saskatchewan (2005) 273 R Sask. 265; Kruger v Commonwealth (1997) 190 CLR 1.*

⁵ This distinguishes the exercise undertaken here from the thorough coverage of jurisdiction and the Convention in J Cassidy, "Unhelpful and Innapropriate?: The Question of Genocide and the Stolen Generations" in *Australian Indigenous Law Review*, 13, 2009, 1.

⁶ The Constitution of Australia, 1900, s51 (xxvi) states: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... the people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws".

⁷ The Act created the right to remove Aboriginal children for the purpose of "apprenticing them". Section 3 provided: "Any child who refuses ... may be removed to some home or institution".

⁸ Section 2(v) empowered the Governor and Board of Protectors to regulate "the care, custody and education of child aborigines".

⁹ This was done by simply deleting all other words in the section other than "people of any race".

¹⁰ Discussed in D Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia*, Abingdon, 2008, 100.

¹¹ Discussed in P Read, "The Return of the Stolen Generation", *Journal of Australian Studies*, December 1998, 8.

ACTUS REUS CULPABILITY UNDER THE CONVENTION

Culpability under subsection (e) of Article 2 of the Convention on Genocide requires proof that children were: (i) “taken”; (ii) “forcibly”; and (iii) “placed in another group”.

(i) “Taken”

The first requirement under subsection (e) is that children must have been “taken”. In this instance the best meaning to attribute to “taken” is its ordinary meaning, which is “to remove”.¹² In Australia, the action of taking is, arguably, exacerbated further by the fact that the estrangement was often permanent. Children were actively discouraged from returning home and many never did. However, the duration of the absence from community is not central to establishing whether a “taking” actually occurred. “Taking” is only the initial requirement that needs to be established, after which all the other necessary elements for liability must also be met.

The century in which children were taken can be divided into three consecutive eras: “protection”, “welfare”, and, “self-management”. Each era provided its own legislative procedure for the removal of children from their families.

a. The Protection Era

From 1860 through to the 1940s, states appointed high-ranking public servants and religious officials as “protectors” to oversee the removal of children from their communities and to facilitate their assimilation into colonial society. The Chief Protector and Protection Board had the power to direct where Aboriginal people lived. They used this power to take children from their communities without court approval.¹³ Protectors generally entered communities without warning and with an entourage of police, often removing several children in a single day. Residential School survivor, Bessie Singer, remembers standing by the community water tank and being grabbed from behind by a policeman and dragged off without a word being spoken to her.¹⁴

In New South Wales, the exercise of Protector discretion¹⁵ resulted in up to 300 children being institutionalised in Residential schools in the first two decades of the removal period.¹⁶ One New South Wales school, the Coolbrook Home, received around 350 indigenous children in its fifty-four years of operating.¹⁷ Although Protectors did not have to justify taking children from their homes, they often cited “child neglect” as

¹² *Oxford English Dictionary*, Oxford University Press, 3rd ed, 2010, 1811.

¹³ For example, section 6 of the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*, states simply that a “Protector” once appointed by the Governor would “have and exercise the powers and duties prescribed” including “powers of relocation”, which was interpreted as giving the Queensland Protector unfettered power to remove children without parental consent.

¹⁴ M Jacobs, *White Mother to a Dark Race: Settler Colonialism, Materialism and the Removal of Indigenous Children in the American West and Australia*, Nebraska, 2009, 25.

¹⁵ *Aborigines Protection Bill 1915* (NSW).

¹⁶ *Bringing them Home*, n1 at 34.

¹⁷ *Ibid*, 30.

justification to other government agencies.¹⁸ Aboriginal communities, on the other hand, received little feedback justifying the actions of state authorities during this period.¹⁹

b. The Welfare Era

The 1940s saw a shift in control from Protectors and Protection Boards to Welfare Boards. These were statutory bodies created specifically to oversee removals in each state.²⁰ Importantly, takings had to be justified according to statutory criteria during this era. For example, the New South Wales Child Welfare Act 1939, stipulated that children who were “destitute”, “neglected” or “uncontrollable”²¹ could be removed. The same Act stated that “the best interests of the child” must be the predominant consideration for removal.²² Whilst it appeared to be benevolent legislation, officials used the poor living conditions of Aboriginal communities to justify taking greater numbers of children. While little government effort was made to alleviate the widespread poverty that existed in these communities, increasing numbers of “destitute” children were taken²³ during the 1950s.²⁴

Unlike the Protection Era in which the statutory framework was specifically directed at Aboriginals, state and federal legislation in this period covered *all* children. Legislation was, however, applied differently to Aboriginal children under the control of Welfare Boards, who existed in a half-way limbo state, and non-Aboriginal children who were truly wards of the State.²⁵ Segregation of the children ensured that Aboriginal children were placed in assimilationist institutions that intentionally denigrated their culture, in order to depreciate its value so that it could be replaced by settler culture and values.²⁶

c. The Self-Management Era

During the 1960s, Self-Management Era, Welfare Boards were abolished and Aboriginal children became wards of the state. This was a positive shift for Aboriginals. Even though takings were still occurring and young Aboriginals were still being placed in Residential Schools, voluntary enrolments and matriculation were now also possible.²⁷ Takings continued up until 1972 when the Aboriginal Advisory Council was established in New South Wales and protectionist legislation was repealed in the other territories,²⁸ thus ending the practice of removing Aboriginal children from their communities.²⁹

¹⁸ Ibid, 171. Auber Neville was a prominent Protector who frequently professed the noble and necessary nature of the work he and his cohort were carrying out so ruthlessly, in public and to authorities.

¹⁹ Jacobs, n14 at 23.

²⁰ This occurred in all states except the Australian Capital Territory, which instead used the Commonwealth Neglected Children and Juvenile Offenders Act 1905.

²¹ Sections 41-47 of the Child Welfare Act 1939 (NSW) are discussed in *Bringing them Home*, n1 at 39.

²² Ibid.

²³ Ibid, 40.

²⁴ Often this would occur when a child had been hospitalised for illness. *Bringing Them Home* records the story of ‘Evie’ who tells of being devastated at being from a hospital by men who claimed to be taking her back to her mother but instead took her to a residential school. See n1 at 128.

²⁵ Ibid at 27.

²⁶ Ibid.

²⁷ Jacobs, n14 at 125.

²⁸ The Aborigines Act 1971 (Qld), repealed the Aboriginals Preservation and Protection Act 1939 and the Torres Strait Islanders Act (Qld); in New South Wales Aboriginal children were to be dealt with by the

(ii) “Forcibly”

The second requirement of subsection (e) of the Convention on Genocide is that the taking must have been forcibly achieved. The natural and ordinary legal meaning of “forcibly” is to take by physical or mental compulsion, or without consent.³⁰ The use of force in the removal of Aboriginal children took three main forms: overt physical compulsion; removal without parental consent; and parental consent induced by duress.

The use of force by government agents when removing children often met with physical resistance. During the protection era when physical force was predominant, no justification was given and no consent was sought or deemed necessary.³¹ The testimony of Aboriginal communities in *Bringing Them Home* reflects the terror they experienced: survivors recount tales of hiding their young under mats and shrubbery in order to thwart armed police.³² When children who had been hidden were found, physical confrontation followed, usually led by the children’s mothers.³³

By the time the Welfare Era ended almost one-third of the Aboriginal population had been forcibly placed under state control without the valid consent of their parents.³⁴ This massive proportion was reached by a continuous stream of takings until the stolen generation period ended.³⁵ Although appeals were possible in the later period, few Aboriginal communities possessed, or were provided with, the knowledge or resources to utilise the appeals process.³⁶ Parental permission was rarely sought or given, and misrepresentation was frequently used by state agents to make families compliant. Mothers were told that police and welfare agents needed to take their children out of the community to receive emergency treatment, only to later find that they were not ill at all and had been taken instead to Residential Schools.³⁷ Scenarios like these satisfied the legislative criteria and reduced the immediate opposition of parents and communities, leaving them to deal with the heartbreak of a *fait accompli*. Even in the last decades of the Schools’ operation, duress was still evident.³⁸ By this time many powerless and poverty-stricken communities had been reduced to believing that the authorities were too strong and that they had no option other than to just let it happen.³⁹

Department for Child Welfare and Social Welfare which set up the Aboriginal Advisory Council: *Bringing them Home*, n1 at 42.

²⁹ *Ibid.*

³⁰ *Black’s Law Dictionary*, 5th ed, 580.

³¹ *Bringing them Home*, n1, provides numerous examples of forcible takings described as “kidnappings”.

³² Jacobs, n14 at 124.

³³ *Ibid.*, 172.

³⁴ Jacobs, n14 at 28; other estimates have ranged between 10 percent and 47 percent - see *Bringing them Home*, n1 at 30-31.

³⁵ *Ibid.*

³⁶ *Ibid.*, 35.

³⁷ *Ibid.*, 5.

³⁸ *Ibid.*, 29.

³⁹ *Ibid.*

(iii) “Placed in another group”

Residential Schools were not “schools” in the normal sense of being educational institutions that supplemented Aboriginal family and community knowledge. They were residential institutions aimed at completely severing the link between Aboriginal children and their communities and ensuring that they never drifted “back to the black”.⁴⁰ Aboriginal learning was considered dangerous and its removal was aimed at achieving a complete and permanent transition of identity. Children were re-parented, taught and cared for by white Australians in the employ of either the church or the government. *Bringing Them Home* details the trauma experienced by Aboriginal children whose parents never visited and who were “routinely told that the circumstances of their removals were that their mother couldn’t take care of them or had not wanted them”.⁴¹ Most Aborigines who left the Residential Schools could not locate their communities or family and had difficulty relating to them even when they could be found.⁴²

Exposure to white settler culture was a defining feature of the schools. Isolated from their communities, children were inculcated with an exclusively foreign mind-set.⁴³ Education was in English only, with aboriginality being so heavily derided in the curriculum that children became ashamed of being indigenous.⁴⁴ Aboriginal language and other cultural practices were prohibited and punished, and contact with Aboriginal communities was completely severed.⁴⁵ From the 1860s up until their closure in the 1970s, the consistent intention of the facilities was to eliminate indigenous identity and replace it with that of “another group”.⁴⁶ This reflected a widespread belief amongst white Australians that the best interests of the child required total assimilation into white Australian settler society.

(iv) The Test for Liability under International Law

Liability under international law requires that a substantial part of the group must have been targeted.⁴⁷ The test drawn from international litigation requires that those affected must be a “substantial number proportionate to the population of the group”.⁴⁸ The number of children taken in Australia between 1860 and 1960 was around 100,000, which is nearly a third of the Aboriginal population.⁴⁹ This figure easily satisfies the “substantiality” test.

International law also requires that Aboriginals, Torres Strait Islanders and “half-castes” must form a type of group whose protection was intended by the Convention.⁵⁰

⁴⁰ C Tatz, “Genocide in Australia”, *AIATSIS Research Discussion Papers*, No8, Sydney, 2010, 26. Online at: <http://www.kooriweb.org/gst/genocide/tatz.html>.

⁴¹ Jacobs, n14 at 24.

⁴² *Bringing them Home*, n1 at 260.

⁴³ Short, n10 at 100.

⁴⁴ *Bringing them Home*, n1 at 120.

⁴⁵ Short, n10 at 91.

⁴⁶ *Bringing them Home*, n1 at 30.

⁴⁷ *Prosecutor v Goran Jelisic* (Trial Judgement) IT-95-10,T, (1999) para 81.

⁴⁸ *Ibid*, para 82.

⁴⁹ <http://reconciliation.org.au/nsw/education-kit/stolen-generations>.

⁵⁰ *Jelisic*, n47 at para 66.

Aboriginal and Torres Strait Islanders obviously come within the Convention on Genocide's scope because they are distinct, discernible, racial and/or ethnic groups. "Half-castes", however, are a group specially created by the Australian government for separation and segregation into state institutions in order to reconstruct their identities.⁵¹ *Bringing them Home* provides an incontrovertible narrative of how creating the classification of "half-castes" as a third racial group, aided government attempts at assimilation.⁵²

MENS REA CULPABILITY UNDER THE CONVENTION

The *mens rea* requirement for Article 2 of the Convention on Genocide is "intent to destroy". International law requires that "prosecutors must prove, both, that the accused committed the underlying offence, and that they did so with the specific intent to destroy a protected group".⁵³ David McDonald argues that the omission of "cultural" genocide from the Convention means that the type of destruction intended is either the physical destruction in whole or in part of the race, or the destruction of all traces of racial identity.⁵⁴ This position is also espoused by Julie Cassidy who presents a strong case as to why the actions of the state with regard to Aboriginal Australians *do not* meet the criteria for genocide.⁵⁵ Apparently, the slow, incremental, deterioration of culture over time is not sufficient to satisfy the second element.

The intent required by the Convention on Genocide is subjective. *Kruger v Commonwealth*⁵⁶ is the leading Australian case discussing this. In *Kruger* the plaintiffs were children who had been forcibly taken and a mother whose child had been taken. The parties claimed that state actions under the Northern Territories Aboriginal Ordinance 1918, which empowered Protectors to take children arbitrarily, amounted to genocide under Subsection (e) of the Convention. They sought judicial recognition of what had happened to them, acknowledgement of state liability, and damages. They failed in all three. The court held that the lack of formal codification into domestic law rendered the claim of genocide ineffective. The Court also suggested that the state's intention could not be "destruction" because the expressed state policy of acting in the best interests of the child precluded it.⁵⁷

The finding of the Court that *dolens specialis*, a form of subjective, specific aggravated intent, must fail if legislation states that it is enacted for the "protection" and "welfare" of an indigenous group by a colonial government, is wrong.⁵⁸ The Court confuses

⁵¹ A Neville frequently referred to the "three races ... black, white and half-caste", see *Bringing Them Home*, n1 at 94; Also see Short, n10 at 89.

⁵² J Ferrari, "Black Armband History Dumped", *The Australian*, 26/2/2010, online ed. at: <http://www.theaustralian.com.au/news/nation/black-armband-history-dumped/story-e6frg6nf-1225834505675>.

⁵³ D MacDonald and G Hudson, "The Genocide Question and Indian Residential Schools in Canada", *Canadian Journal of Political Science*, 45, 2, 2012, 9.

⁵⁴ *Ibid*, 5.

⁵⁵ Cassidy, n5 at 129.

⁵⁶ *Kruger v Commonwealth* (1997) 190 CLR 1.

⁵⁷ K Windschuttle, *The Fabrication of Australian History: Stolen Generation 1881-2008*, Macleay Press, Sydney 2009, 54.

⁵⁸ Tatz, n40 at 32.

morally worthy legislative intentions with *actual* intentions that can be evinced from the clear actions of those implementing the legislation. The *actual* intention of the state was to assimilate Aboriginal children by destroying their identity and replacing it with another identity, that of the white settler. In these circumstances, I believe that the “assimilationist intention” carried out on such a grand scale amounts to the intention to destroy Aboriginal society as it naturally existed, thus satisfying the requirements of the Convention.

(i) Defining Intention

Colin Tatz separates *actual* intent from *male fides* intent.⁵⁹ *Mens rea* is traditionally defined as encompassing two different mental states. The first is *direct* intent, where a perpetrator actually desires a particular result. The second is *oblique* intent, where an actor continues acting although certain that a specific outcome will occur if they persist.⁶⁰ In order to satisfy this high standard, mere knowledge or true belief is not enough. Intent must be subjective and a test of whether or not an actor “should have known an outcome” will not be held by the courts to be sufficient.

Male fides or “evil intent” on the other hand, refers to moral intention. The distinction between the two is essentially between what was *actually* intended and *why* it was intended. In discerning intent the court in *Kruger* should only have looked at the first. Instead, in making “the best interests of the child” the indicator of intent the Australian courts have imported the test of *male fides* into their assessment. When the Court in *Kruger* reasoned that the Australian government cannot have intended the physical destruction of the Aboriginal people because they were committed to the best interests of the people, they are essentially saying that the state was well-intentioned. They assume that a well-intentioned body could never desire racial destruction. But they are wrong. There was a *direct* intention to achieve the desired result of assimilating Aboriginal people into white Australian culture, using Residential Schools as the vehicle for destroying their own culture. If total assimilation is “destruction” under the Convention on Genocide, the Court should only have looked at this particular, *direct* form of intention and disregarded whether or not it was well intentioned. All that is required is a clear exposition of either a *direct* or *oblique* intention to assimilate. This is supported by the various policies and laws that affected that intention. Whether assimilation is considered to be in a group of individuals’ best interests is about the moral code that underpins the state’s policy position and is irrelevant to establishing *actual* intent.

(ii) Intended Assimilation

Assimilationist intent during the Protection Era is evidenced by statements made by government officials responsible for removing children. Auber Neville, the Chief Protector in Western Australia is a clear “protector” villain in stolen generation history. He intended to instigate a three-phase assimilation process in which the first stage would see “full bloods die out”; the second phase would separate “half-castes” from their communities; and, the third would control marriage.⁶¹ *Bringing Them Home* concludes

⁵⁹ Ibid, 23.

⁶⁰ For a basic definition of intent similar to this see: *R v Wentworth* [1993] 2 NZLR 450.

⁶¹ *Bringing them Home*, n1 at 25.

that under his regime, “the ultimate purpose of removal was to control the reproduction of Indigenous people with a view to ‘merging’ or ‘absorbing’ them into the non-Indigenous population”.⁶² The end product would be total eradication of aboriginality and its replacement by Western culture and norms.⁶³

In the Welfare Era, Residential Schools were the main federal machine for achieving assimilation.⁶⁴ At the Commonwealth-State Native Welfare Conference held in 1937, repeated references were made to the “Aboriginal problem”, by an aging Neville, in a speech chillingly called “the destiny of the race”.⁶⁵ Protectors implored both state and federal governments to enact legislation to manifest the desired assimilationist intention. Consequently, in 1944, the Native Citizenship Act required Aboriginals to renounce all tribal links and affiliations in order to acquire citizenship⁶⁶ and child removal policies continued as in the previous era. Children were absolutely prohibited from speaking their own languages and expressing any of their cultural practices or values. At the same time, they were heavily inculcated with colonial Christian ideology and practices as well as capitalist ideals that were inconsistent with the values learnt in their communities.⁶⁷

Assimilationist intent is more difficult to prove in the third, Self-management Era. Tracey Westerman describes the period as one in which “a continuation of the systematic genocide continued even if it masqueraded under a stated policy of ‘integration’”.⁶⁸ Up until the 1970s the goal was still to eventually eradicate full-blooded Aborigines by bringing their standard of living up to that of the “ordinary [white] Australian”.⁶⁹ The schools were seen as instrumental in providing the tools for Aborigines to become successful cogs in the white Australian state machine. The intention to completely absorb Aboriginal society into white colonial culture continued, unabated, for just over a century even though the degree of legal justification required changed in each era.

(iii) Assimilation as “Destruction”

If we keep MacDonald and Cassidy’s relegation of “cultural genocide” in mind, then viewing assimilation as tantamount to physical destruction or obliteration of racial identity is a cautious path to establishing specific intent. However, forced assimilation as set out above is enough to trigger the Convention and satisfy the “destruction” criteria. Subsection (e) was included so that “the forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation

⁶² Ibid.

⁶³ Short, n10 at 90.

⁶⁴ T Westerman, *Government Policies Affecting Aboriginal People in WA*, Psychology Speaking, Western Australia, 1997, 3.

⁶⁵ Short, n10 at 90.

⁶⁶ Section 4(2) Native Citizenship Act 1944 (WA).

⁶⁷ J White, “Histories of Indigenous-Settler relations: Reflections on Colonialism and the Hybrid Economy” in *Australian Aboriginal Studies*, vol 1, 2011, 85.

⁶⁸ Westerman, n64 at 3.

⁶⁹ Ibid, 4.

of children”.⁷⁰ Australian Residential Schools deconstructed Aboriginal children’s identity by depriving them of their culture and links, destroying their memories of who they were, and then imported new ideals and skill sets to ease their permanent transition into white Australia. When they exited the institutions at around 15, purposely created language barriers and cultural ignorance prevented the children connecting back into their communities. It was hoped that former school residents would then, through miscegenation, ensure the discontinuation of Aboriginality.⁷¹

The insidious nature of the Residential School System was the drawing of a generational line that prevented Aboriginal communities from regenerating and promulgating an independent future. Thus, assimilation is “physical destruction” because it literally depopulates, not as quickly as immediate killing, but just as effectively in the end. Simultaneously, it completely destroys racial identity, as distinct from cultural identity. The Report cites numerous people who lack knowledge and any understanding at all that they are Aboriginal. This is well beyond simply being unaware of cultural practices attaching to identity.⁷² It is severance.

CANADA’S RESIDENTIAL SCHOOLS

In 1920, Duncan Scott, Deputy Minister for Indian Affairs, said that he wanted “to get rid of the Indian Problem ... our object is to continue until there is not a single Indian in Canada who has not been absorbed into the body politic”.⁷³ Although the Canadian story reflects the Australian experience in many ways, for the purpose of liability under Article 2(c) of the Convention on Genocide, discussion will focus less on how indigenous children got into the schools and more on the conditions they encountered once they were there. As was the case in Australia, indigenous children were forced into Residential Schools with the intention of denying them their culture and identity until they ceased to exist as indigenous and became white Canadians.⁷⁴ The schools became a defining feature of indigenous-government relations. 125,000 indigenous children passed through 125 schools between 1880 and 1996.⁷⁵ 20 percent of the indigenous population was processed through them. Thus, the common law requirement discussed in the Australian component concerning substantiality of population is *prima facie* satisfied. With regard to the extra criteria in subsection (c) that a part or whole of the people be targeted, such a substantial portion of the youth population represents not only a part, but given their potential as future-adults-in-the-making, the entire group.

Administration of the institutions was split between church and state, although, in contrast to Australia, the Federal government retained final control. Federal legislation, including the Gradual Civilization Act 1856 and the infamous and still operative Indian Act, vested all powers of decision-making concerning indigenous education in the Canadian government and made attendance at Residential Schools compulsory for

⁷⁰ MacDonald and Hudson, n53 at 17.

⁷¹ *Bringing them Home*, n1 at 94.

⁷² *Ibid*, 241.

⁷³ G Erasmus, *Notes on a History of the Indian Residential School System in Canada*, University of Calgary, 2004, 3.

⁷⁴ *Ibid*, 4.

⁷⁵ MacDonald and Hudson, n53 at 6.

indigenous children.⁷⁶ With the Truth and Reconciliation Commission on Residential Schools currently preparing a report similar to *Bringing Them Home*, due in 2014, the discussion of genocide in Canada is very pertinent.

ACTUS REUS CULPABILITY UNDER THE CONVENTION

The *actus reus* requirement of Article 2, subsection (c) of the Convention on Genocide requires proof that conditions of life calculated to bring about physical destruction are deliberately inflicted. The conditions have to be severe enough to cause the death of a substantial part of the targeted population.⁷⁷ Common law clarification of the conditions required to satisfy subsection (c) is found in *Prosecutor v Akayeshu*.⁷⁸ The *Akayeshu* test is whether a situation exists in which minimal requirements essential to life, such as a bare subsistence diet and insufficient medical supplies, are not being provided. *Prosecutor v Kayishema*⁷⁹ also added inadequate housing, hygiene, and clothing to this list of basic provisions.

(i) “Minimal Requirements Essential to Life”

Living standards in Residential Schools clearly met this test. The types of treatment Indian, Inuit and Metis children were subjected to combine to form a range of omissions to provide “essentials” that have been described as verging on physical torture. Celia Haig-Brown comments that the most commonly held memories of the school experience are of fear and hunger.⁸⁰ Physical labour took precedence over learning and whilst non-indigenous children received five hours education a day, indigenous children received two hours education and were then put to work.⁸¹ Avoidance of prescribed tasks often “resulted in public humiliation, head shaving and bread and water diets”.⁸² The situation at the schools was so severe that children frequently ran away, in many cases into harsh geographical surroundings in which they died, or committed suicide.⁸³ Exposure to disease and poor medical care were also defining features of the schools, to the extent that “Residential Schools endangered the bodies of aboriginal children through exposure to disease, over work, underfeeding and various forms of abuse”.⁸⁴ The conditions worsened when children expressed their own indigenous culture. Haig-Brown records that her father had a needle pressed through his tongue for speaking his language.⁸⁵ The Truth and Reconciliation Commission states that minimal clothing,

⁷⁶ Erasmus, n73 at 3. The term “Indigenous” is used to refer to the children who attended residential schools in Canada, in order to distinguish them from the “Aboriginals” who attended similar institutions in Australia.

⁷⁷ *Prosecutor v Jelusic*, n47 at para 82.

⁷⁸ *Prosecutor v Akayeshu* (1998) ICTR 96-4-T, para 506.

⁷⁹ *Prosecutor v Kayishema* (1999) ICTR-95-1-T, para 115.

⁸⁰ C Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School*, Arsenal Pulp Press, Vancouver, 2010, 61.

⁸¹ V Kirkness, “Aboriginal Education in Canada: A Retrospective and a Prospective”, *Journal of American Indian Education*, Volume 39, 1999, 3.

⁸² Haig-Brown, n80.

⁸³ E Furniss, *Victims of Benevolence: The Dark Legacy of Williams Lake Residential School*, Arsenal Pulp Press, Vancouver, 2010, 62.

⁸⁴ M Kelm, *Colonizing Bodies: Aboriginal Health and Healing in British Columbia 1900-1950*, UBC Press, Vancouver, 1998, 57.

⁸⁵ Haig-Brown, n80 at 16.

sleeping on the ground, a maize and water diet, physical and sexual abuse, and wind-torn, structurally unsound school buildings, are conditions of life no better than prisoner of war camps.⁸⁶

(ii) “Physical Destruction”

The types of conditions inflicted on malnourished children were a fast track to death. Doctor Peter Bryce’s state-funded report on the schools in 1919 exposed a child death toll of between 30-60 percent from treatment he described as amounting to a “national crime”. Of 125,000 matriculations, Macdonald reports that only 80,000 survived the schools.⁸⁷ Although this is a higher proportion than that estimated by Bryce, it still represents physical destruction on a scale that affects a substantial portion of the race. Although murder is sometimes claimed, survivor reports show the strongest causal links for death as being the substandard physical conditions that were inflicted on the children.⁸⁸ The reason that a large number of children were dying in these conditions ought to have been obvious to those running the schools.

(iii) “Inflicted”

The substandard living conditions were inflicted by government agents in a number of ways. The first is through inadequate funding. The government refused to provide enough money to raise school conditions to livable standards.⁸⁹ Although it received numerous reports of the dire conditions in Residential Schools, the Federal government continued to give them only a tenth of the funding provided to schools for other Canadian children.⁹⁰ This meant that even if the schools wanted to improve their living conditions the money to do so was not available. Schooling institutions that were funded by the churches, predominantly the Catholic Church, were no better. Religious staff show up in the testimonies of survivors as fearful figures bent on maintaining torturous conditions of subjugation that were administered with religious zeal.⁹¹

(iv) State Liability

Federal culpability can also be found in the administration and running of the schools. While many individuals responsible for the abhorrent treatment of indigenous children were under the direct mandate of the church, all of them had to comply with and were controlled at the highest levels, by the government.⁹² In this sense the individuals operating the schools and administering the sorts of treatment discussed above were acting as government agents, thus making the state vicariously liable for their behaviour under Article 3 of the Convention on Genocide. Article 3 creates liability for “complicity” in genocide.⁹³ Colin Tatz describes this as effectively creating three legal personalities

⁸⁶ *TRC Interim Report*, n2 at 5.

⁸⁷ Macdonald and Hudson, n53 at 96.

⁸⁸ K Annett, *Hidden No Longer: Genocide in Canada Past and Present*, Squamish Nation, 2010, 10.

⁸⁹ Haig-Brown, n80 at 69.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 62.

⁹² D Paul, *We Were Not the Savages: A Mi'kmaq Perspective on the Collision Between European and Native American Civilizations*, Fernwood, Nova Scotia, 2000, 27.

⁹³ Convention on Genocide, n3 at Article 3.

in the genocide discussion: the victim; the perpetrator; and, the bystander.⁹⁴ This tripartite foundation draws a direct causative link between the government as vicarious perpetrator and the conditions inflicted on indigenous children as victims. Such a conclusion requires full awareness and complicity, which will be established in the *mens rea* discussion below.⁹⁵

MENS REA CULPABILITY UNDER THE CONVENTION

Mens rea requires that physical destruction was intended, calculated and deliberately inflicted. Intention to physically destroy is a very high standard and notions of cultural or racial identity destruction under section (c) will not satisfy it. The latter two *mens rea* requirements, *deliberate* and *calculated* combine to form *oblique intention*, which I believe is sufficient to satisfy the overarching requirement that physical destruction was intended.

(i) “Deliberate” and “Calculated”

In order to conclude that infliction was *deliberate* it must be shown that conditions at the schools were not accidental. This, in turn, is tied to whether or not the effect was *calculated*, which requires the government to have actively turned their mind to it. It needs to be shown that the government was aware that the schools were operating under conditions causing physical destruction, and despite that knowledge, continued to provide only enough funding to allow the administration to continue operating in the same destructive manner. It must be clear that the effect was “calculated” in the sense that it had been mentally processed and that existing conditions were “deliberately” inflicted through subsequent, informed, actions. This was, in fact, exactly the case: “The high infant and child mortality rate became known right at the beginning of the twentieth century”.⁹⁶ The Truth and Reconciliation Commission Chairperson, Murray Sinclair, commented recently that: “mass graves, deaths, no surprise really, of course we knew”.⁹⁷ This information had been provided to the government in reports that it had instigated and paid for. One 1915 report to the Federal government stated that 24 percent of healthy children died from illness after moving to Residential Schools.⁹⁸ In the 1920s another informant, Doctor Corbett, found a similar mortality rate to Bryce and observed that nearly all of the students were below a passable standard of health.⁹⁹ Whilst tuberculosis was a problem in wider Canadian society, and should be acknowledged as a contributing factor to the mortality rate, the problem was exacerbated in the schools where moribund children were forced to continue work and

⁹⁴ Tatz, n40 at 4.

⁹⁵ A precedent for individual bystanders acting as “Crown agents” is found in the New Zealand case of *R v Symonds* in which individuals buying land directly from Maori in contravention of the Treaty of Waitangi were legally reconstructed into crown agents in order to prevent Maori sellers from claiming residual rights to property they had parted with. *R v Symonds* (1847) NZPCC 387.

⁹⁶ Kelm, n84 at 61.

⁹⁷ “TRC Chairman Declares Residential Schools Genocide”, *The Manitoban*, February 2012, online at: <http://www.themanitoban.com/2012/02/trc-chairman-declares-residential-schools-genocide/9266>.

⁹⁸ J Milloy, *A National Crime: The Canadian Government and the Residential School System 1879–1986*, University of Manitoba Press, Manitoba, 1999, 24.

⁹⁹ *Ibid.*

attend classes.¹⁰⁰ The death toll was met with either apathy or a concerning enthusiasm from the Department of Native Affairs and Federal government. A government worker in one of the schools is quoted as saying after one boy's death, "perhaps it's good this one dies, its parents still cling to the old ways".¹⁰¹

It is clear from the above that the government knew that the schools were producing mass physical destruction of indigenous children yet continued to mandate and empower their operation without change. This is especially apparent when the government made the Schools compulsory for indigenous children under the Indian Act in 1921, even though numerous reports, including Doctor Bryce's, expounded the devastating impact the Schools were having on the children.¹⁰² The government was operating under a policy of "aggressive civilization" based on the United States government's policy towards native Indians.¹⁰³

(ii) *Oblique Intention of Physical Destruction*

Assessment of the deliberate and calculated criteria shows that the Canadian government was fully informed about the impact and operation of Residential Schools by their own investigations. Therefore, actions taken, either directly or through agents, were fully informed and the government clearly possessed the requisite *oblique intention*. That is to say, the Federal government can be found to have deliberately pursued destruction as a goal because it acted knowing that such destruction was already occurring on a massive scale, and would continue to occur unless it intervened, and had the capacity to alter the situation, but chose not to.

In my view, the above satisfies the *actus reus* and *mens rea* requirements of Article 2, subsection (c) of the Convention and shows that Canada committed genocide against its indigenous people through the instrument of its Residential Schools.

ABORIGINAL / INDIGENOUS RESPONSES AND EFFORTS

When aboriginals/indigenous peoples ask why they were subjected to these bad things by colonial society, it widens the rift that already exists between themselves and members of that society.¹⁰⁴ Some contemporary commentators even believe that discussions about genocide are "inappropriate and unhelpful".¹⁰⁵ Yet, such conversations force recognition that historical atrocities actually occurred and have left a continuing legacy of dysfunctional indigenous communities. They also reveal a sense of apathy toward addressing this dysfunction by a settler society that is bent on moving on and leaving its past behind.

Aboriginal Responses in Australia

¹⁰⁰ Ibid, 99.

¹⁰¹ Kelm, n84 at 61.

¹⁰² Ibid at 64.

¹⁰³ Furniss, n83 at 25.

¹⁰⁴ Tatz, n40 at 35-37.

¹⁰⁵ Cassidy, n5 at 114, quoting Australian Prime Minister, Kevin Rudd.

There is a wealth of cases, community protest, and actions, undertaken by Aboriginal people in Australia in order to have the nation confront the legacy of its genocidal past. *Kruger* is one example of this. The case possessed strong socio-political motives. Although they lost, the claimants inspired other Aboriginal communities out of their passivity and to take a similar stand. Although *Cubillo v Commonwealth of Australia*¹⁰⁶ did not directly deal with genocide the court acknowledged that a claim for damages might lie against the Australian government. In 2001 the cases of *Nulyarimma v Thompson* and *Buzzacott v Minister for the Environment* (heard in conjunction)¹⁰⁷ both sought to have genocide recognised for modern state actions. The first case concerned implementation of the “Ten Point Plan” which restricted native title claims under *Mabo v Queensland*.¹⁰⁸ *Nulyarimma* argued that his people’s separation from the land and its vital resources and culture under the Plan would amount to genocide. *Buzzacott* concerned the Minister of Culture and Heritages’ refusal to name Lake Eyre a world heritage site, something that would have afforded it significant traditional environmental protection. Instead the government allowed the mining company BHP Billiton to commence oil-prospecting operations on the site. Both claims invoked customary international law yet failed because Australia has not yet ratified the Convention on Genocide. The later cases reinforce “genocide” as an appropriate term for articulating Aboriginal dispossession and a powerful weapon in combating their ongoing domestic mistreatment.

There have also been increased efforts to have genocide acknowledged on the socio-political front. At the vanguard of this activism is the Aboriginal Tent Embassy. Since 1972 there has been a Tent Embassy sitting without interruption in at least one state.¹⁰⁹ The Embassy is a peaceful means of protest aimed at achieving self-determination.¹¹⁰ The Embassy claims that the Australian government has committed genocide against Aboriginal and Torres Strait Islander peoples. In 2001, the Tent Embassy announced that it was dispatching an envoy to The Hague to persuade a delegation to return with them to Australia to investigate “the Australian obligation to honour the United Nations Convention on Genocide” concerning the stolen generation.¹¹¹ The central tenet of the Embassy’s Manifesto is to continue promoting Aboriginal issues in order to ensure that redress efforts do not weaken. The Embassy will remain in force as long as the group feels that injustice against Aboriginal Australians continues.¹¹² It has been lambasted by influential non-Aboriginals as promulgating a “black arm band history” that is run by troublemakers.¹¹³

Mindsets and Motivations

Reactions from Aboriginal communities promote genocide as being a two-fold process. First, Aboriginals believe that they still inhabit a seriously disadvantaged position in

¹⁰⁶ See for example, *Cubillo v Commonwealth of Australia* [2001] FCA 1213.

¹⁰⁷ *Nulyarimma v Thompson & Buzzacott v Minister for the Environment* (1999) 96 FCR 153.

¹⁰⁸ *Mabo v Queensland* [No 2] (1992) 175 CLR 1.

¹⁰⁹ Short, n10 at 33.

¹¹⁰ *Ibid*, 149.

¹¹¹ Aboriginal Tent Embassy: The Hague Declaration, 2001, at: <http://www.eniar.org/news/ate.html>.

¹¹² <http://www.aboriginaltentembassy.net/>, 27/5/2012.

¹¹³ P Muldoon and A Schaap, “Confounded by Recognition: The Apology, The High Court and The Aboriginal Tent Embassy” in A Hirsch (ed), *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair*, Routledge, London, 2011, 14-15.

society. Second, they do not believe their disadvantage is being properly acknowledged or addressed by either the government or Australian society. Indigenous rights commentator Chris Graham sums it up by saying that despite the Tent Embassy being set up “all those years ago” because Aboriginal people were seeking land rights, a treaty and sovereignty, there is still only minimal and restricted recognition of land rights, no treaty and no self-governance.¹¹⁴ This exacerbates the social problems caused by Residential Schools. The Aboriginal students who left the Schools found themselves victims of abuse when confronted by a world in which they had no community and family support. Hundreds of powerful individual stories are contained in *Bringing Them Home*. Once outside the School many Aboriginals battled alcohol problems and severe mental health issues. Suicide rates amongst Aboriginal people are particularly distressing.¹¹⁵ Aborigines are at the bottom of income, housing and education statistics and have the highest numbers in the criminal justice system, domestic abuse and drugs and alcohol.¹¹⁶ The link between the stolen generation and the persistence of these statistics is that the trauma has been inherited. Psychologists employed by the Human Rights and Equal Opportunities Commission responsible for compiling *Bringing them Home*, concluded that “the impact of the forcible removals continues to resound through the generations of indigenous people. The overwhelming evidence is that the impact does not stop with the children removed, it is inherited by their own children in complex and often heightened ways”.¹¹⁷ The social experiences also threaten the existence of Aboriginal culture as a whole. Evidence of this can be found in the area of language, with only 6 percent of 250 Aboriginal languages now being considered “healthy”.¹¹⁸

The second concern is the growing sense of apathy amongst other Australians. When *Bringing them Home* was first released, Prime Minister, John Howard, was adamant that “this generation of Australians” was not going to apologise and bear the guilt of actions undertaken by previous generations.¹¹⁹ This view peaked again when the Leader of the Opposition, Tony Abbott, commented that it is “time to move on” when questioned about the Tent Embassy.¹²⁰ While this caused a dramatic and immediate protest by the Embassy, leading to a public confrontation with the Prime Minister, there was a substantial amount of public support for Abbott’s statement from within non-Aboriginal Australian society. This was largely based on the view that an earlier state apology and reparations meant the government had done enough to compensate for the past and Aboriginals now owned their own problems.¹²¹

¹¹⁴ C Graham, “The Tent Embassy: Fact v Fiction, Black v White”, *Crikey*, 15/2/2012 online at: http://www.crikey.com.au/2012/02/15/the-tent-embassy-fact-v-fiction-black-v-white/?wpmp_switcher=mobile.

¹¹⁵ *Bringing them Home*, n1 at 327.

¹¹⁶ *Ibid*, 198.

¹¹⁷ *Ibid*.

¹¹⁸ G Zuckermann, “Aboriginal languages deserve revival” in *The Australian Higher Education*, 26/9/2009, online at: <http://www.theaustralian.com.au/higher-education/opinion/aboriginal-languages-deserve-revival/story-e6frgcko-1225766141160>.

¹¹⁹ J Gemes, “Witnessing the Apology”, *Australian Aboriginal Studies*, Vol 1, July 2008, 1.

¹²⁰ Graham, n114.

¹²¹ Supporting a movement in this direction is a group of academics and journalists who have been labelled “Australia’s very own holocaust deniers”. See Tatz, n40 at 36.

Indigenous Actions/Responses in Canada

Canadian case law on genocide is limited. In *Malbouef v Saskatchewan*¹²² in 2005, the court struck consideration of the Convention on Genocide from the claim in order to prevent it having retroactive effect. However, using the Convention to support an analysis of the sort undertaken here would have been valuable. The case is interesting because, as with the later Australian cases, it reveals that the term “genocide” is a powerful weapon in the Indigenous claim for reparation for past injustices suffered at the hands of the government.

Social pressure from indigenous groups within Canada has taken a distinct form. The controversial figure of Kevin Annett and the organization, “Hidden from History”, sits at the forefront of radicalism aimed at exposing what they deem to be the silent genocide of Indigenous Canadians and providing a solution.¹²³ Annett’s involvement also extends to the groups “Friends and Relatives of the Deceased” and the “International Human Rights Tribunal into Genocide in Canada”. They have used the media to highlight the substantial number of hidden deaths stemming from forced matriculation in Residential Schools and to expose unmarked mass graves.¹²⁴ The group sees the only redress to the “systemic genocide” committed by the Canadian government to be the establishment of an independent republic comprised of Canada’s indigenous people to be known as “The Republic of Kanata”.¹²⁵

Mind-sets and Motivations

The motivation behind Canadian and Australian initiatives is supported by two similar kinds of evidence. The continuing suffering caused by the schools in Canada is believed to be so bad by some commentators that it requires repeal of the Indian Act to end the genocide.¹²⁶ The Indian Act and the schools are both fundamental threads of the same story, both having made significant contributions to the same status quo. Whilst the 1985 amendment of the Indian Act saw the repeal of its most offensive discriminatory provisions, it continues to significantly disadvantage indigenous individuals and upholds the supremacist mind-set that originally promoted the establishment of Residential Schools.¹²⁷ Similar to Australia, the “controlling of education” saw a deconstruction of identity that some commentators say continues to threaten the survival of indigeneity.¹²⁸ As in Australia, this is manifested in extremely poor social statistics, where: “Common circles of emotional, physical and sexual abuse, as well as addiction, suicide, poverty and other markers of generational trauma are considered the

¹²² *Malbouef v Saskatchewan* (2005) 273 R Sask. 265.

¹²³ <http://www.hiddenfromhistory.org/>, 27/5/2012.

¹²⁴ Annett, n88 at 55.

¹²⁵ Hiddenfromhistory, n123.

¹²⁶ Ibid.

¹²⁷ “It’s Time to Repeal the Indian Act”, *The Vancouver Sun*, 27/1/2012, online at <http://www.vancouver.sun.com/life/Guest+editorial+time+repeal+Indian/6064568/story.html>.

¹²⁸ Erasmus, n73 at 4.

residual effects of the Residential School experience”.¹²⁹ The youth suicide rate amongst indigenous peoples is 11 times higher than the national average.¹³⁰

The problem is compounded in Canada, as in Australia, by a growing sense of apathy amongst the descendants of white settler society. Even the dramatic difference in suicide rates has manifested an attitude of indignation towards the complaints and grievances of indigenous societies.¹³¹ Furthermore, there is now a threat to the Truth and Reconciliation Commission completing its task because its funding is inadequate¹³² and three commissioners, including the Chairperson, Harry Laforme, have resigned.¹³³ Given the social and socio-economic situation of Canada’s indigenous population, the failure to support an Inquiry into the actions that produced such a situation undermines the values of trust, care and redress that underpin the Commission and the government’s purported new inclusive approach to indigenous peoples.¹³⁴

As in Australia, the term “genocide” is important to indigenous groups because Residential Schools have produced a legacy of continuing disadvantage, which settler society and governments have become apathetic towards. It is one way of highlighting what happened to them, and of triggering legal processes and exposing the inadequate redress and acknowledgement made by the government. It challenges the settler view that enough has been done and indigenous people are now solely responsible for their own problems.

GOVERNMENT RESPONSES

The Australian Government

Government responses in both Australia and Canada have been to ignore the claim of genocide. Thus the possibility of ongoing disadvantage and apathy has never been seriously considered by them. In 2008 the incoming Rudd government apologised to the Aboriginal peoples of Australia. This apology acknowledged “the great wrong” done to a “proud people” but ignored the term “genocide”.¹³⁵ Prime Minister Rudd stated that the apology would serve as “just the first step” to redress, which included “acknowledgment of the past”. The scope of the apology has led to it being labelled “counter-productive” because it focuses on the victims instead of the actions of the perpetrator, thereby reinforcing the view that the state is a “neutral arbiter”, which somehow lessens its culpability and, therefore, its responsibility to provide redress.¹³⁶ Recognition is limited to financial deals struck with individual Aboriginals. These payments do not guarantee support for the healing or rebuilding of Aboriginal

¹²⁹ MacDonald and Hudson, n53 at 7.

¹³⁰ J Bhatia, “Canada: Aboriginal Youth Suicides Hit Crisis Rate”, *Global Voices*, January 18 2011.

¹³¹ C Sampson, “A Colonial Double Bind”, (eds) H George, L Kermayer, *Healing Traditions: The Mental Health of Aboriginal Peoples in Canada*, UBC Press, Vancouver, 2008, 109.

¹³² *TRC Interim Report*, n2 at 8.

¹³³ “Chairman Quits Troubled Residential School Commission”, *CBC News Canada*, 20/10/2008 online at <http://www.cbc.ca/news/canada/story/2008/10/20/truth-resignation.html>.

¹³⁴ M James, “A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission”, *The International Journal of Transitional Justice*, 2012, 1–23, 1.

¹³⁵ Muldoon and Schaap, n113 at 186.

¹³⁶ *Ibid* at 185.

communities. *Bringing them Home* identified the need for greater efforts to provide aid to support the social reconstruction of Aboriginal communities.¹³⁷ Money in and of itself would not provide this and the focus needs to be oriented toward development of grassroots sustainable organisations.¹³⁸ Financial payouts and other efforts at redressing the plight of indigenous peoples in both countries, fail to address the systemic reasons for social inequality, and, have been relatively ineffective.¹³⁹

The Canadian Government

Canada has an all-party genocide protection group whose fifty-three members hold a mandate to observe situations where genocide may be occurring and undertake actions to prevent it transpiring or escalating.¹⁴⁰ Even with such a group expressing a commitment to abhorring genocide, there has been no government use of the term concerning its own actions. Truth and Reconciliation Commission member, Murray Sinclair, has already publicly admitted when referring to Residential Schools, that “in reality it was an act of genocide”.¹⁴¹ In Australia, *Bringing them Home* addressed genocide as a means of recognising and affecting the need for redress and concluded that it applied absolutely to the stolen generation.¹⁴² Yet the Australian government has never acknowledged that aspect of the Report. Therefore, in Canada, even if the Truth and Reconciliation Commission’s final report concludes that genocide did occur, political action may not follow. The state may, itself, obscure the pathway to truth and reconciliation by keeping records sealed and delaying funding.¹⁴³

As in Australia, there has been an apology by the Canadian government to its indigenous peoples. While some officials accepted the apology, other indigenous leaders felt it was an insufficient acknowledgment of the continuing harm that has been inflicted by Residential Schools.¹⁴⁴ The apology has been coupled with a financial settlement of a \$1.9 billion “healing fund”, topped up by a subsequent payment of \$40 million. This was to be allocated in part to reparations, with former Residential School students being given the option to elect to either sue the government or receive a “Common Experience Payment”, or an “Independent Assessment process” if there had been significant sexual or physical abuse.¹⁴⁵ As the comments by Sinclair in the *Interim Report* reveal, however, not enough is being done to accompany this with support to ensure that healing accompanies the payment.¹⁴⁶ Sinclair also intimated that acknowledging the devastating impact of the Residential Schools is a long-term process that goes far beyond an Official Apology and Commission Report. He highlights the proclivity of

¹³⁷ *Bringing them Home*, n1 at 307.

¹³⁸ For example “Link up”. This is a grass roots family-tracing and reunion agency that reintroduces separated aboriginal peoples back into their own communities: see *Bringing them Home*, n1 at 30.

¹³⁹ James, n134 at 1.

¹⁴⁰ <http://www.preventiongenocide.org/>, 27/5/2012.

¹⁴¹ TRC Chairman Declares Residential Schools Genocide, n97.

¹⁴² *Bringing them Home*, n1 at 234.

¹⁴³ *TRC Interim Report*, n2 at 8.

¹⁴⁴ See Beverley Jacob’s response to the apology on behalf of the Native Women’s Association of Canada at: <http://www.youtube.com/watch?v=jxc1TNWKFoM>, in which she acknowledges the apology with gratitude but suggests it is a step in the bigger direction of making indigenous nations strong again through respect.

¹⁴⁵ “School Abuse Victims Getting 1.9 Billion”, *CBC News Canada*, 23/11/2005 online at: <http://www.cbc.ca/news/canada/story/2005/11/23/residential-package051123.html>.

¹⁴⁶ *TRC Interim Report*, n2 at 8.

settler Canadian society to dismiss the claims of First Nations by saying that enough is being done, and, furthermore, claims that the government is using that view to justify inaction.¹⁴⁷ Many indigenous Canadians reject the payouts as being too little, too late, and are compiling a class action suit against the Canadian government in order to ensure that justice is done.¹⁴⁸

GOING FORWARD: OPTIONS AND AVENUES

Indigenous Australian and Canadian communities view “genocide” as the correct term for what happened to them and as a means of confronting societal apathy. However, it is unlikely that the Convention alone will be enough for Australian or Canadian Courts to hold their governments accountable. Although the Convention’s jurisdiction obviously extends to both states as ratifying parties, and enables it to oversee proceedings against “constitutionally responsible rulers”,¹⁴⁹ its power to be utilised in exercising that jurisdiction is dubious. Courts have already held that the Convention on Genocide will not be applied retroactively,¹⁵⁰ even if the impact is proven to be a continuing one. The Convention does not speak to the legacy of acts committed prior to its inception and is intended to preclude future acts of genocide.

A bigger obstacle is found in Article 6, which indicates that where a person [state] is found to be culpable under the Convention on Genocide, “they should be tried by a competent tribunal of the State in the territory of which the act was committed or by such an international panel as may have jurisdiction with respect to those contracting parties which have accepted its jurisdiction”.¹⁵¹ David MacDonald highlights the inherent conflict in the idea that a state would take itself to task on the issue of genocide.¹⁵² He also points out that indigenous groups are precluded from asserting genocide internationally because they are not internationally recognised states; therefore they do not have the ability to draw Canadian and Australian governments into their territory to be tried as an opposing party of the same kind under the Convention on Genocide.¹⁵³

Canada and Australia’s endorsement of the United Nations Declaration on the Rights of Indigenous Peoples [the Declaration] may, however, have provided two new avenues for pursuing genocide.

Article 7(2) of the Declaration establishes a right to live without being subjected to genocide. The term “genocide” is not expressly defined but subsection (e) of the Convention is explicitly incorporated:¹⁵⁴

¹⁴⁷ TRC Chairman Declares Residential Schools Genocide, n97.

¹⁴⁸ Association of Citizens Prosecutors Press Release, Toronto, July 1 2012 online at: <http://itccs.org/category/association-of-citizen-prosecutors>.

¹⁴⁹ Convention on Genocide, n3 Article 10.

¹⁵⁰ *Malbeouf v Saskatchewan* (2005) 273 R Sask. 265.

¹⁵¹ Convention on Genocide, n3 Article 6.

¹⁵² Macdonald and Hudson, n53 at 20.

¹⁵³ Ibid.

¹⁵⁴ Article 7(2) of the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, A/61/L.67 (2007) [the Declaration].

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Given the United Nations application of the Convention definition of genocide in the Rome Statute of the International Criminal Court 2002 [RSICC] and subsection (e) being incorporated into Article 7(2) of the Declaration, the same definition and qualifications that are set out in this discussion could apply in an analysis of culpability under the Declaration.¹⁵⁵

The first area in which the Declaration could aid indigenous claims is through the establishment of an international body that recognises stand-alone claims from indigenous peoples. If indigenous peoples from Canada and Australia could invoke the Declaration's provisions for dispatching a rapporteur to hear responses to claims, there could well be a strong international declaration of genocide having taken place. If the Convention on Genocide could be applied by such a body it would be a milestone in vindicating claims of genocide by indigenous groups, validating interim domestic reports, and would act positively as a catalyst for social redress efforts. Other implications of a Declaration being made by a body of this sort remain relatively unclear. Given the presumption against retroactive criminalisation entrenched in other United Nations instruments such as the RSICC, it is unlikely that punishments would be imposed.¹⁵⁶ A declaratory judgment would be valuable to the genocide debate, and increase international pressure for Canada and Australia to continue their efforts at redress through supporting their indigenous peoples. Other nations would also be forced to take notice of the pronouncement of an international body to which they are a party, much more so than they would to a foreign domestic report such as will be produced by the Truth and Reconciliation Commission.

The second potentially productive impact of the Declaration, if it is given force by domestic courts, is through the strength it lends towards self-determination claims, providing a potential solution to the problem raised by MacDonald concerning the barriers to indigenous groups accessing the Convention on Genocide. Article 3 enshrines the right to self-determination whilst other articles protect determination aspects, including the dictation of education requirements.¹⁵⁷ This is one of the reasons that Australia and Canada initially opposed the adoption of the Declaration. The Canadian delegate found the notion of self-determination was irreconcilable with a constitutional democracy.¹⁵⁸ Similar fears of the force the Declaration might lend to self-determination movements also led to prevarication by the Australian, United States and New Zealand governments.¹⁵⁹ While this option relies on future developments in the field of self-determination, it is an interesting international law point to examine. If the Declaration assists the development of some form of self-determination within indigenous communities in Australia and Canada, more doors will open by which governments could be held accountable. If an independent nation or nations with full self determination could be crafted out of the Declaration, they could become states

¹⁵⁵ Rome Statute of the International Criminal Court, 2002, Article 6. At present it is only enforceable by state bodies and not by individuals or groups.

¹⁵⁶ *Ibid*, Article 10.

¹⁵⁷ United Nations Declaration on the Rights of Indigenous People, Article 3.

¹⁵⁸ "Indigenous Rights Outlined by UN", *BBC News*, 13/9/2007: <http://news.bbc.co.uk/2/hi/6993776.stm>.

¹⁵⁹ *Ibid*.

with the ability to bring the governments into their own jurisdiction under Article 6 of the Convention on Genocide, for acts performed after its ratification. It could also open up doors for actions predicated on International Customary Law.

CONCLUSION

In my view, there is sufficient evidence to show that the indigenous peoples of Canada and Australia, the First Nations, Inuit, Metis, Aborigines and Torres Strait Islanders have all been the victims of “genocide”, through the operation of Residential Schools under their respective colonial governments. The difficulty has been establishing this conclusively in domestic courts, which favour government actions as being benevolently motivated rather than looking at the results of their actions on their victims at the time. Aboriginal groups asserting genocide have also met firm public opposition. Yet ongoing calls for recognition from indigenous groups in both countries shows the importance of continuing to use the term “genocide” because indigenous peoples still suffer the destructive effects of Residential Schools, and apathy within contemporary settler society needs to be confronted. Governments are obstinately avoiding placing the genocide mantle over their past actions and courts are also reasoning their way out of taking responsibility as demonstrated by *Kruger*. This means that the crippling psychological and social impact of the Residential Schools continues to perpetuate itself largely unchecked. Seeking international recognition reinvigorates redress efforts and stimulates conversations around the aboriginal/indigenous plight. The new avenues provided by the Declaration on the Rights of Indigenous Peoples, particularly, enables aboriginal/indigenous peoples to mobilise and ensure that their continued suffering and disadvantage is not simply ignored, or, worse still, reconstructed into a problem of their own making that is being used to hold the rest of Australian and Canadian society to ransom.

OFFICIAL RECOGNITION OF INDIGENOUS AND MINORITY LANGUAGES IN CANADA AND SWITZERLAND: COMPARING THE ROMANSH AND INUIT LANGUAGES

Bettina Wehren*

INTRODUCTION

There are an estimated 5,000 to 7,000 languages present in the world today.¹ Of these languages, only a few are spoken by a large number of people. It is estimated that, “97 percent of the world’s population speaks 4 percent of its languages, while only 3 percent speaks 96 percent of them”.² It is stated that over the 21st Century, 2,500 languages could be lost,³ and 90 percent of existing languages could become extinct.⁴ These numbers show a shocking trend in language decline and language loss. The reasons are various and can be found in social, cultural, economic and even military pressure.⁵ Many of the lesser-spoken languages in the world are indigenous languages,⁶ and they are in danger of extinction.⁷

The loss of a language should concern the wider global population because, as the United Nations Educational, Scientific and Cultural Organization [UNESCO] states:⁸

Every language reflects a unique world-view with its own value systems, philosophy and particular cultural features. The extinction of a language results in the irrecoverable loss of unique cultural knowledge embodied in it for centuries, including historical, spiritual and ecological knowledge that may be essential for the survival of not only its speakers, but also countless others.

Indigenous languages were often only transmitted orally from one generation to the next.⁹ Traditional knowledge is, therefore, “always only one generation away from extinction”.¹⁰ The loss of indigenous languages and the consequent loss of the knowledge they contain is of concern to the whole of humankind. A wealth of medical knowledge has come to the western world from the field of traditional indigenous

* Bettina Meier-Wehren is a LL.M graduate of the Faculty of Law, University of Auckland, Aotearoa New Zealand.

¹ Estimated numbers vary between 5000 and 7000. See Department of Economic and Social Affairs [DESA] *State of the World’s Indigenous Peoples*, United Nations, 2009, 57; A Dalby, *Language in Danger: The Loss of Linguistic Diversity and the Threat to Our Future*, Columbia University Press, New York, 2003, ix.

² DESA, *ibid* at 57.

³ Dalby, n1 at ix.

⁴ DESA, n1 at 58.

⁵ D Nettle and S Romaine, *Vanishing Voices: The Extinction of the World’s Languages*, Oxford University Press, New York, 2000, 7.

⁶ The terms Indigenous and Aboriginal are used interchangeably throughout this article, although “Indigenous” is used primarily in the Swiss context, whereas “Aboriginal” is primarily used to describe the native languages and peoples of Canada.

⁷ DESA, n1 at 57.

⁸ United Nations Educational, Scientific and Cultural Organization [UNESCO] “Frequent Asked Questions on Endangered Languages: Why should we care?” UNESCO <www.unesco.org>.

⁹ DESA, n1 at 58.

¹⁰ Nettle and Romaine, n5 at 71.

medicine. Indispensable medicines such as aspirine, for example, were developed from the investigation of traditional herbalism.¹¹ In Africa, traditional smithing would provide cheaper steel tools for the continent than those that are imported. However, the practice of orally passing knowledge about traditional smithing inter-generationally is no longer being followed and the art of traditional smithing is in danger of being lost.¹² These examples show that the loss of orally transmitted languages should be of concern to people throughout the world, even to speakers of extremely viable languages such as English, Arabic and Chinese, because they contain knowledge that is valuable to all of us.

THE IMPORTANCE OF INDIGENOUS LANGUAGES IN CANADA

In Canada, at least 60 Aboriginal languages are spoken. However, only Cree, Ojibwa, Dakota and Inuktitut are deemed viable enough to survive because they have large numbers of speakers in both Canada and the United States.¹³

That the loss of Aboriginal languages is a pressing issue in Canada is evident from the 2005 Report of Canada's Task Force on Aboriginal Languages and Culture *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Metis Languages and Cultures* [Task Force Report].¹⁴ The Task Force was mandated to "propose a national strategy to preserve, revitalize and promote First Nation, Inuit and Metis languages and cultures".¹⁵ To this avail, the Task Force consulted Aboriginal people throughout the country and gathered information on the importance of indigenous languages and what could be done to save them from extinction. It found that:¹⁶

A people's philosophy and culture are embedded in their language and given expression by it. Language and culture are key to the collective sense of identity and nationhood of the First Nation, Inuit and Metis people.

Most Aboriginal people consulted believed that speaking their own language helps people to understand who they are, not only in relation to themselves but also in relation to their families and communities and in relation to higher creation.¹⁷ Aboriginal languages also convey the strong ties that Aboriginal peoples have with their territories. The Task Force Report stated that the First Nations, Inuit and Metis relationship to the land is reflected in their languages.¹⁸ This relationship means that the Aboriginal peoples of Canada cannot be viewed separately from their lands to which they carry an inherent responsibility.¹⁹ This responsibility may, for example, encompass taking care of sacred sites for community ceremonies. Knowledge of such

¹¹ Dalby, n1 at 212.

¹² Nettle and Romaine, n5 at 167-8.

¹³ Ibid, 8.

¹⁴ Task Force on Aboriginal Languages and Culture, *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures*, Department of Canadian Heritage, Ottawa, 2005 [Task Force Report].

¹⁵ Ibid, i.

¹⁶ Ibid, ii.

¹⁷ Ibid, iv.

¹⁸ *Task Force Report*, n14 at 22.

¹⁹ Ibid, 23.

sites and their significance are transferred from generation to generation in the tradition of oral recounting by Elders.²⁰ The Elders pass information by storytelling: it is “through telling stories that the histories of the peoples, as well as important political, legal, and social values are transmitted”.²¹ This form of communicating knowledge will be lost if the Aboriginal language becomes extinct. The loss of knowledge would, in turn, diminish both the culture and the people.

Canada’s Aboriginal peoples are enlisting the aid of the government to assist with reclaiming their languages. They attribute the diminution of their languages to the assimilation policies of Canada’s past governments. The Task Force was of the opinion that the Aboriginal languages had been devalued, as opposed to English and French, by the assimilationist efforts of the government, and that this devaluation had led to the languages being neglected by their own speakers.²² As the Task Force put it:²³

Many First Nations, Inuit and Metis people have been taught that their languages are inferior and best forgotten. Generations of First Nation, Inuit and Metis people were taken away, often forcibly, from their families and communities and placed in residential schools. There, with the support and active cooperation of the churches, they were systemically stripped of their traditional languages, cultures and spiritual beliefs.

Pupils were punished or beaten when speaking their own language and as a consequence, the language was associated with shame and fear, and with the notion that it was not important. These feelings subsequently led to the language not being transmitted by Residential School pupils to their own children.²⁴ To counteract these negative effects of the Canadian government’s assimilation policies, Aboriginal groups are seeking to have their languages formally recognised by the state.²⁵

THE IMPORTANCE OF STATE RECOGNITION OF A LANGUAGE

The importance of gaining formal recognition of Aboriginal languages by the Canadian state is exemplified by the official recognition given to te reo Maori (the Maori language) in Aotearoa New Zealand.

The claim to make te reo Maori an “official language” was heard by the Waitangi Tribunal [Waitangi Tribunal], which investigates Crown breaches of the principles of the Treaty of Waitangi, in 1985.²⁶

²⁰ Ibid.

²¹ S Venne, “Understanding Treaty 6: An Indigenous Perspective”, in M Asch (ed), *Aboriginal and Treaty Rights in Canada*, University of British Columbia Press, Vancouver, 1997.

²² *Task Force Report*, n14 at 75.

²³ Ibid.

²⁴ See L Fontaine, “Re-Conceptualizing and Re-Imagining Canada: Opening Doors for Aboriginal Language Rights” (2006) 31 *SCLR*. (2d), 312-313.

²⁵ *Task Force Report*, n14 at 75; see also V Galley, “Reconciliation and the Revitalization of Indigenous Languages”, in G Younging, J Dewar and M DeGagne (eds), *Response, Responsibility and Renewal: Canada’s Truth and Reconciliation Journey*, Aboriginal Healing Foundation, Ottawa, 2009, 244 at 247.

²⁶ Waitangi Tribunal, “Report of the Waitangi Tribunal on the Te Reo Maori Claim: Report Summary” (2012) Waitangi Tribunal <www.waitangi-tribunal.govt.nz>. The official Report citation is *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 2nd ed, Department of Justice, Wellington, 1989 [*Te Reo Maori Report*].

An internationally accepted socio-linguistic definition of “official language” states the following:²⁷

A language which is used for political, legal and administrative communications within a given political territory. The legal status of official languages is usually constitutionally guaranteed and official languages are also taught in the education system. Some countries have more than one official language. ... In such cases there is often a ‘division of labour’ and not all official languages are used in all functions (e.g. certain documents may not be available in all languages). To grant official status to a language is a symbolic and political act ...

The term “official language”, therefore, denotes the language that the state uses in all of its operations. It is considered to be the most prestigious status that can be conferred on a language.²⁸ It is generally assumed that speakers of the official language are in a better position than non-speakers because they speak the language needed to receive state services, to receive an education, and to work in state institutions.²⁹ As stated in the above definition, making a language an “official language” is a symbolic and political act. The official status elevates a language by giving it importance. Consequently, the culture upon which the language status is conferred is also elevated.

A language can also be recognised as a “national language”. The term “national language” connotes that a certain language is “part of the country’s national heritage, and thus represents more than a simple minority”,³⁰ therefore, “it is recognised as a symbol of national identity”.³¹ This places importance on the language as part of the identity of the state. It does not mean that the language is always used by the state in all its formal functions, but it does mean that the state will promote and protect the language.³²

Te reo Maori became an official language of Aotearoa New Zealand in 1987. The arguments in favour of making it “official” can be applied equally to Canada’s Aboriginal languages and other non-official languages.³³

The *Te Reo Maori Report*,³⁴ which recorded the findings of the Waitangi Tribunal, offers valuable arguments for granting official status to te reo Maori and counters some of the most common objections against such recognition. With regard to the importance of maintaining and advancing te reo, various witnesses had stated that without the language, the culture would die. These statements were aptly summarised by the Maori

²⁷ J Swann, R Mesthrie, A Deumert and T Lillis, *A Dictionary of Sociolinguistics*, Edinburgh University Press, Edinburgh, 2004, “official language”.

²⁸ Official Languages and Bilingualism Institute, “Official Language Status” Site for Language Management <www.slmc.uottawa.ca> [OLBI Official Language Status].

²⁹ S May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language*, Routledge, New York, 2012, 162.

³⁰ Official Languages and Bilingualism Institute “National Language Status” Site for Language Management in Canada <www.slmc.uottawa.ca> [OLBI National Language Status].

³¹ Swann et al, n27 at “national language”.

³² OLBI National Language Status, n30.

³³ Arguments used to recognise te reo Maori as an official language in Aotearoa New Zealand also support recognition of indigenous languages elsewhere in the world.

³⁴ *Te Reo Maori Report*, n26.

proverb, “Ka ngaro te reo, ka ngaro taua, pera i te ngaro o te Moa” (“If the language be lost, man will be lost, as dead as the moa”).³⁵ The Tribunal responded:³⁶

... it is quite obvious that the language and its preservation is important. It is unique, spoken nowhere else in the world, and is part of a rich heritage and culture that is also unique. There is a great body of Maori history, poetry and song that depends upon the language. If the language dies all of that will die and the culture of hundreds and hundreds of years will ultimately fade into oblivion.

This evaluation is true of any Aboriginal or minority language. It reinforces the point made in Canada by the Task Force, that without its language, a culture ultimately cannot survive.

The Waitangi Tribunal also pondered the question of why the use of te reo Maori had declined and came to the conclusion that, among other factors:³⁷

The real cause (if a single cause can be assigned) is that Maori people do not speak the language in their homes. Dr Benton also referred to this when he said to us: ‘There are many reasons why people decided (often against their will and despite their deepest feelings) to abandon the use of Maori in their homes. One major and ever-present factor in such decisions however has been the obvious lack of support for the language in the New Zealand community as a whole.’

In Aotearoa New Zealand, the Waitangi Tribunal came to the conclusion that the best protection for te reo was to use it and, therefore, opportunities for its use must be provided. Official recognition would publicly signal this need,³⁸ and would create opportunities for the language to be used in situations where it was not yet spoken.³⁹ The Waitangi Tribunal concluded that the official recognition of te reo Maori should be:⁴⁰

... an act that publicly demonstrates that preservation of the Maori language is important to all of us, Maori and Pakeha alike. It should be an act that restores proper status to the Maori language as something valuable that we acknowledge to be valuable. It should be an act that puts the language, and therefore the culture, on to a pedestal so that our children will see ‘being Maori’ as something to be proud of, not something to be treated as worthless.

Linguists do not all agree that granting official status necessarily benefits the language and guarantees its survival. To many, it is more important to confer power to the people speaking the language to ensure its survival.⁴¹ Obviously, if the “official language status” is only declared on paper, without any opportunities being created for its use by the state, it will decline. However, if official language status is coupled with opportunities for use, as envisioned by the Waitangi Tribunal, state support will expand its use. Thus, the granting of official status was considered important to Maori (as it was to speakers of the Romansh language discussed later) as a first step towards strengthening their language usage.

³⁵ Ibid, 3.1.4; reference is being made to the Moa, a species of bird now extinct in Aotearoa New Zealand.

³⁶ Ibid.

³⁷ Ibid, 3.3.5.

³⁸ Ibid, 5.2.

³⁹ Ibid, 5.08.

⁴⁰ Ibid, 8.1.7.

⁴¹ Nettle and Romaine, n5 at 40.

ARGUMENTS FOR OFFICIAL STATUS FOR ABORIGINAL LANGUAGES IN CANADA

The considerations of the Tribunal regarding te reo Maori can also be applied to the Aboriginal languages of Canada. The Aboriginal languages constitute part of Canada's national heritage, and were well established when the first settlers arrived. That Aboriginal peoples are one of the distinctive features of Canada is today also recognised by state entities themselves. As the Commissioner of Official Languages points out: "Together with Native peoples and multiculturalism, linguistic duality is one of the fundamental features of the Canadian identity":⁴² But even though the Aboriginal peoples are considered to be a fundamental part of Canada's identity, their languages do not currently receive the same degree of state protection as the English and French languages. There is a mismatch here, because, if Aboriginal peoples are a fundamental aspect of Canada's identity, then their languages should also be acknowledged as a fundamental part of Canadian identity. Granting official language status to Aboriginal languages would provide such acknowledgement.

WHY COMPARE CANADA WITH SWITZERLAND?

As already stated, there are between 5,000 to 7,000 languages in the world.⁴³ However, only about 100 of these languages are officially protected languages in their own countries. Further, only approximately 20 percent of the states of the world have more than one official language.⁴⁴

Switzerland has four official languages: German, French, Italian and Romansh. Romansh is only spoken by around 0.5 percent of the population, approximately 35,000 speakers.⁴⁵ Yet it is recognised in the Federal Constitution of the Swiss Confederation [Swiss Constitution] as an official language.⁴⁶ Canada, on the other hand, although comprising a much larger territory than Switzerland, concentrates only on its two settler languages at a federal level and fails to embrace its Aboriginal language heritage to the same extent.

Switzerland obviously is not the first country that comes to mind when writing about Aboriginal peoples and their languages. In Europe in general, there is little talk of Indigenous or Aboriginal peoples, but only of "minorities" and consequently, of minority languages, as for example in the European Charter on Regional or Minority Languages.⁴⁷ So how does the term "minority" compare to the terms "aboriginal" and "indigenous"? There is no fixed definition for the term "minority" in international law. However, the

⁴² Office of the Commissioner of Official Languages *Annual Report: Special Editions 35th Anniversary 1969-2004 Volume I* (Minister of Public Works and Government Services Canada, 2005). <www.ocol-clo.gc.ca> at 1 [OCOL Annual Report].

⁴³DESA, n1.

⁴⁴ OLBI Official Language Status, n28.

⁴⁵ J Furer, *Die Aktuelle Lage des Romanischen* (Bundesamt für Statistik, Neuchatel, 2005, 30.

⁴⁶ Federal Constitution of the Swiss Confederation 1999 (CH) Article 70(1) [Swiss Constitution]; W Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, 3rd ed, Houndmills (UK), Palgrave Macmillan, 2010, 25.

⁴⁷ See European Charter on Regional and Minority Languages (opened for signature 5 November 1992, entered into force 1 March 1998).

United Nations Office of the High Commissioner of Human Rights' *Factsheet on Minority Rights* provides the following helpful definition:⁴⁸

The most commonly used description of a minority in a given State can be summed up as a non-dominant group of individuals who share certain national, ethnic, religious or linguistic characteristics which are different from those of the majority population. In addition, it has been argued that the use of self-definition which has been identified as 'a will on the part of the members of the groups in question to preserve their own characteristics' and to be accepted as part of that group by the other members, combined with certain specific objective requirements, could provide a viable option.

The terms "aboriginal" and "indigenous" are often used interchangeably, although the term "indigenous" has prevailed as the more generic international term for many years.⁴⁹ The United Nations Declaration on the Rights of Indigenous Peoples [the Declaration],⁵⁰ does not provide a definition for the term "indigenous" or "indigenous peoples". Instead, the Declaration "underlines the importance of self-identification, that indigenous peoples themselves define their own identity as indigenous".⁵¹ Article 33 of the Declaration reads as follows: ⁵²

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.

This does not give much insight into the concept of "indigenous". However, according to the *Factsheet: Who are Indigenous Peoples?*, issued by the United Nations Permanent Forum on Indigenous Issues [the Permanent Forum],⁵³ the term "indigenous" encompasses the following:⁵⁴

- Indigenous peoples are peoples that define themselves as indigenous;
- have a historical continuity with pre-colonial societies;
- have strong links to territories and surrounding natural resources;
- have distinct social, economic or political systems and have distinct languages, cultures and beliefs.

The Permanent Forum maintains self-identification from within is the better criterion for identifying who are indigenous peoples than the application of any fixed external definition.⁵⁵

Indigenous languages then, can be understood as the languages of indigenous peoples. Indigenous peoples are groups that have a historical continuity to the regions in which

⁴⁸ Office of the High Commissioner for Human Rights, *Fact Sheet on Minority Rights*, FS 18/Rev.1 (1998) <www.ohchr.org>

⁴⁹ United Nations Permanent Forum on Indigenous Issues "Indigenous Peoples, Indigenous Voices, *Factsheet: Who are Indigenous Peoples?*" <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> [The Permanent Forum].

⁵⁰ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/61/L.67 (2007) [the Declaration].

⁵¹ DESA, n1 at 5.

⁵² The Declaration, n50 at Article 33.

⁵³ The Permanent Forum, n49.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

they live in societies that pre-date colonial settlement, and who have developed unique cultural relationships and distinct social and economic systems within their territories.

“Indigenous peoples” and “minorities” are similar in that both are usually in a non-dominant position in their state territories, possess languages and religious beliefs that differ from the dominant group, and want to maintain their own identity.⁵⁶ Minority groups differ from indigenous peoples, however, in that they “do not necessarily have the long ancestral, traditional and spiritual attachment and connections to their lands and territories that are usually associated with self-identification as indigenous peoples”.⁵⁷

While Romansh constitute a “minority” with regard to their language, the speakers of Romansh in Switzerland most certainly do not constitute an indigenous people. They do not have a distinct social or economic system or possess culture and beliefs that are distinct from the rest of the Swiss population. They have the same religious beliefs (predominantly Roman-Catholic and Protestant), and cultural habits as the rest of the Swiss population. They do not consider themselves different from the rest of the Swiss population, except in so far as their language is concerned. The same is true for the other three language groups. Furthermore, even though their language is present only in one specific part of Switzerland they do not have a spiritual attachment to that territory as their place of origin.

The Romansh language evolved from the Latin language introduced after the Romans conquered large parts of Western Europe, among them the territory of what today constitutes the Swiss canton Graubunden.⁵⁸ The language has been present in the region of Graubunden since the 3rd century, and, until 1850, was the primary language spoken.⁵⁹ There is, therefore, a historic continuity of the language being spoken in a distinct territory, even if this continuity is not coupled with the same degree of spiritual attachment to the territory that is a feature of indigenous relationships.

A further point that highlights similarities between Romansh and Aboriginal languages is found in the explanatory report to the Council of Europe’s, European Charter on Regional and Minority Languages [European Charter],⁶⁰ which states: “Many European countries have on their territory regionally based autochthonous groups speaking a language other than that of the majority of the population.”⁶¹ The term “autochthonous” can be understood as, “indigenous rather than descended from migrants or colonists”.⁶² Switzerland has protected the Romansh language under the European Charter since 1998.⁶³ Romansh can therefore be regarded as one of the

⁵⁶ United Nations Human Rights Office of the High Commissioner *Minority Rights: International Standards and Guidance for Implementation* HR/PUB/10/3, 2010, 4.

⁵⁷ Ibid.

⁵⁸ M Gross and Ors, *Romanisch Facts & Figures*, 2nd ed, Lia Rumantscha, Chur, 2004, 12.

⁵⁹ Ibid, 26.

⁶⁰ European Charter on Regional and Minority Languages (opened for signature 5 November 1992, entered into force 1 March 1998).

⁶¹ “European Charter on Regional and Minority Languages – Explanatory Report” Council of Europe Treaty Office <www.conventions.coe.int> at 1.

⁶² A Stevenson (ed), *Oxford Dictionary of English*, Oxford University Press, 2010, “autochthonous”.

⁶³ Database for the European Charter for Regional or Minority Languages <<http://languagecharter.eokik.hu>>.

autochthonous languages of Switzerland. The terms “indigenous” or “aboriginal” are not so out of place in Europe, after all then. This point is strengthened by the Swiss Constitution, which, in its English translation uses the term “indigenous” in Article 70, Paragraph 2, to refer to the Romansh language.⁶⁴ Therefore, even though Romansh are not an indigenous people, Aboriginal languages and the Romansh language share similarities that allow for a comparison to be made between them.

THE SITUATION IN SWITZERLAND

The Romansh Language

Switzerland is host to a lot of different languages. In the year 2000, Swiss German was spoken by 63.7 percent of the population; 20.4 percent spoke French; 6.5 percent Italian, and 0.5 percent Romansh. The remaining 9 percent of the population spoke Spanish, Portuguese, English, languages of the former Yugoslavia, Turkish, Albanian and other languages.⁶⁵

As stated above, Romansh is spoken by only 0.5 percent of the Swiss population, that is approximately 35,000 speakers. The language is only spoken in five regions of the canton Graubunden, each of which has its own dialect. In 1982, Rumantsch Grischun, an artificially created single language comprising the five different dialects was created and in 1996 it was declared the official language of both Federal and Cantonal Institutions.⁶⁶ Until then, Romansh had been in danger of being overrun by German and the language had been in steady decline since the canton Graubunden acceded to the Swiss Confederation in 1803.⁶⁷ The decline in the use of Romansh led to the formation of various associations aimed at preventing the extinction of the Romansh language, the most prominent being Lia Rumantscha.⁶⁸

After World War I, the claim for constitutional recognition of the Romansh language in canton Graubunden grew and the Executive of Graubunden asked the Federal Executive for recognition as a national language.⁶⁹ The claim for recognition as a national language was prompted by nationalist tendencies in Europe at that time. Italy, which neighbours the canton Graubunden, claimed that Romansh was not an individual language but an Italian dialect, and therefore, the Romansh speaking parts of Graubunden constituted Italian territory.⁷⁰ It was in reaction to such attacks, that the Romansh speaking community pressed for their language to be recognised as a national Swiss language. In 1938, therefore, Romansh was declared a national language of Switzerland.⁷¹

⁶⁴ Swiss Constitution, n46 at Article 70(2).

⁶⁵ D Thurer and T Burri, “Zum Sprachenrecht der Schweiz”, in C Pan, and B Pfeil (eds), *Zur Entstehung des Modernen Minderheitenschutzes in Europa*, Springer, Wien, 2006, 266.

⁶⁶ Gross et al, n58 at 27.

⁶⁷ Furer, n45 at 17.

⁶⁸ Gross et al, n 58 at 17; <www.liarumantscha.ch>.

⁶⁹ C Casanova, Federal Chancellor of Switzerland, “Il rumantsch e l’identitad plurilingua da la Svizra”, speech at an event of the Schweizerische Studienstiftung, Muster, 1 October 2011, Schweizerische Bundeskanzlei www.bk.zjadmin.ch at 6.

⁷⁰ Ibid.

⁷¹ Ibid.

In 1985, Martin Bundi, a Romansh speaking politician, voiced his concern about the state of the language in Parliament. This led to the creation of Constitutional Article 116, which made Romansh an official language in 1996.⁷² A new Swiss Constitution came into force on January 1, 2000.⁷³ The language Article received the new number of Article 70, but in essence it remained the same.

The constitutional enshrinement of Romansh as an official language was the result of concern about its viability.⁷⁴ The change was inspired by the desire to protect the quadrilingualism of Switzerland, which had become one of Switzerland's distinguishing features. The Swiss state wanted to build a single nation while still respecting the individuality of its different partnering entities.⁷⁵ However, the broader political motives behind making Romansh an official language should not obscure the fact that the initiative came from a Romansh speaking politician from canton Graubunden who was representing the views of Romansh speakers concerned about protecting their language and the distinctive culture it is linked to.

Language Policy in Switzerland

(i) The Swiss Constitution

The Swiss Constitution contains three Articles regarding languages: Articles 4, 18 and 70.⁷⁶ Article 4 states the national languages of Switzerland to be German, French, Italian and Romansh.⁷⁷ Article 18 guarantees the "freedom of language". This means that any person in Switzerland is free to use any language in the private realm. However, when communicating with the state administration or in school, a person is restricted to using the one official language assigned to the territory where the person resides, as for example, German in Zurich. This "territoriality principle" restricts the freedom to use any language that one pleases, in any situation, anywhere.⁷⁸ The *territoriality principle* is enshrined in Article 70(2), which is explained in further detail below.⁷⁹

With regard to official status, paragraph 1 of Article 70 of the Swiss Constitution states:⁸⁰

The official languages of the Confederation shall be German, French and Italian. Romansh shall also be an official language of the Confederation when communicating with persons who speak Romansh.

⁷² "Botschaft über die Revision des Sprachenartikels der Bundesverfassung (art. 116 BV) vom 4. März 1991" (1991) Schweizerisches Bundesarchiv <www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10051812> [Botschaft Sprachenartikel] at 312.

⁷³ Confoederatio Helvetica "Neue Bundesverfassung am ersten Januar in Kraft" (press release, 27 December 1999) <<http://www.admin.ch/cp/d/38673686.0@fwsrv.bfi.admin.ch.html>>.

⁷⁴ Botschaft Sprachenartikel, n72 at 310.

⁷⁵ Ibid.

⁷⁶ Swiss Constitution, n46 at Articles 4, 18 and 70.

⁷⁷ Ibid, Article 4.

⁷⁸ Thurer and Burri, n65 at 269.

⁷⁹ Swiss Constitution, n46 at Article 70(2).

⁸⁰ Ibid, Article 70.

This means that at the Federal level Romansh is not awarded the same official status as the other three languages, but is only regarded as an official language when Romansh speakers communicate with Federal entities.

Paragraph 2 of Article 70 states:⁸¹

The Cantons shall decide on their official languages. In order to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take account of indigenous linguistic minorities.

Besides giving the Cantons freedom to decide their official languages, this paragraph enshrines the *territoriality principle* at a constitutional level. Switzerland is made up of 26 cantons. The *territoriality principle* means that one language is ascribed to each specific territory, which then has to be used when communicating with the governmental institutions of this territory and sometimes also in other areas of the public sphere. The aim of the *territoriality principle* is to maintain the original composition of the languages of the state.⁸² In Switzerland, the territoriality principle maintains the original linguistic divisions of the country. It means that in an originally German-only speaking canton, the official language will be German, excluding the other official languages from the cantonal level and municipal level.⁸³ The *territoriality principle* is, therefore, a restriction on the freedom of language.⁸⁴

The remaining paragraphs 3 to 5 of Article 70 read as follows:⁸⁵

3. The Confederation and the Cantons shall encourage understanding and exchange between the linguistic communities.

4. The Confederation shall support the plurilingual Cantons in the fulfilment of their special duties.

5. The Confederation shall support measures by the Cantons of Graubunden and Ticino to preserve and promote the Romansh and the Italian languages.

These paragraphs highlight the emphasis of the Federal language policy on maintaining the linguistic diversity in Switzerland and show the importance given to the preservation of those national languages spoken only by a minority of the population.

(ii) Federal Language Policy

Article 70(2) of the Swiss Constitution allows the cantons to decide their official languages with due consideration being given to the traditional territorial distribution of languages and indigenous linguistic minorities. Switzerland is a Federal state that consists of 26 cantons, each having its own parliament, government and judiciary.⁸⁶ According to Article 3 of the Swiss Constitution, the cantons, “exercise all the sovereign

⁸¹ Ibid.

⁸² Thurer and Burri, n65 at 270.

⁸³ J Voyame, “Overview of Swiss History and Political Institutions”, F Dessemontet and T Ansay (eds), *Introduction to Swiss Law*, Kluwer Law International, The Hague, 2004, 12.

⁸⁴ Ibid.

⁸⁵ Swiss Constitution, n46 at Article 70(3)-(5).

⁸⁶ J Aubert and E Grisel, “The Swiss Federal Constitution”, in F Dessemontet and T Ansay (eds), *Introduction to Swiss Law*, 3rd ed, Kluwer Law International, The Hague, 2004, 20.

rights which the Constitution has not explicitly or implicitly assigned to the Confederation and which it does not forbid them to exercise by a specific rule”.⁸⁷ Therefore, “as long as a given competence is not explicitly assigned to the federal government by the Constitution, it remains within the purview of cantons”.⁸⁸ According to the allocation of competencies in the Swiss Constitution, the cantons are given authority over specific areas of law, including languages, culture and education.⁸⁹ As a consequence, much of Swiss language law is legislated at the cantonal level, with little legislation being enacted at the Federal level.⁹⁰ However, in 2009, the “Bundesgesetz über die Landessprachen und die Verständigung zwischen den Sprachgemeinschaften”⁹¹ [Federal Language Law] came into force.⁹² The Federal Language Law details the Articles of the Swiss Constitution dealing with languages, especially Article 70.

Several Articles are specifically aimed at supporting the Romansh language. Federal texts of special significance must be published in Romansh.⁹³ Article 22 of the Federal Language Law provides financial aid for the Romansh language and culture.⁹⁴ As has been stated above, however, the Federal law only regulates the use of the language when individuals are dealing with Federal institutions.

(iii) Cantonal Language Policy

Each canton, according to Article 51 of the Swiss Constitution, shall adopt a democratic constitution.⁹⁵ The Swiss Constitution gives the cantons the authority to decide on their official languages, while respecting the *territoriality principle*.⁹⁶ As far as the Romansh language is concerned, the Constitution of the canton Graubünden [Graubünden Constitution], states in Paragraph 1 of Article 3, that German, Romansh and Italian are the national and official languages of the canton, each of them being of equal value to the others.⁹⁷ The law concerning languages, the “Sprachengesetz des Kantons Graubünden” of Graubünden [Graubünden Language Law] states in its Article 1 that one of its aims is to strengthen the trilingual status of the canton, to maintain and advance the Romansh and Italian language and to support the endangered national language Romansh with specific measures.⁹⁸ Also, the Graubünden Language Law regulates the allocation of the different municipalities to the linguistic territories, which is necessary to maintain the *territoriality principle* as stated in Paragraph 2 of Article 70 of the Swiss Constitution.⁹⁹

⁸⁷ Ibid, 21.

⁸⁸ F Grin, “Language Policy in Multilingual Switzerland: Overview and Recent Developments” (1999) European Centre for Minority Issues <www.ecmi.de>, 5.

⁸⁹ Thurer and Burri, n65 at 272.

⁹⁰ Grin, n88 at 4.

⁹¹ Bundesgesetz über die Landessprachen und die Verständigung zwischen den Sprachgemeinschaften 2007 (CH) [Sprachengesetz].

⁹² Eidgenössisches Departement des Innern EDI “Inkraftsetzung des Sprachengesetzes” (press release, 04.12.2009) <www.edi.admin.ch>.

⁹³ Sprachengesetz, n91 at Article 11.

⁹⁴ Ibid, Article 22.

⁹⁵ Swiss Constitution, n46 at Article 51.

⁹⁶ Ibid, Article 70(2).

⁹⁷ Verfassung des Kantons Graubünden 2003 (CH) Article 3 [Graubünden Constitution].

⁹⁸ Sprachengesetz des Kantons Graubündens (SpG) 2006, Graubünden, Switzerland, Article 1 [Graubünden Language Law].

⁹⁹ Ibid, Article 2(c).

The main points regarding the use and protection of the Romansh language in the Graubunden Language Law are as follows: Article 3 states that the official languages of the canton are to be used in the legislature, executive and judiciary of the canton. Each person has the right to contact the cantonal authority in any of the three official languages. The cantonal authority will then reply in the language in which it has been contacted. With regard to Romansh, which is constituted of five dialects, Romansh speaking persons can apply their own dialect or the standard language, Rumantsch Grischun, when communicating with cantonal authorities.¹⁰⁰ The cantonal authority will, however, always reply in the standard form of Rumantsch Grischun.¹⁰¹

The Graubunden Language Law also gives Lia Rumantscha, an organisation that dedicates itself to the maintenance of the Romansh language,¹⁰² recurring annual financial funding.¹⁰³ The canton Graubunden is also entitled to fund municipalities or private persons to support projects that maintain and advance Romansh, support Romansh papers and magazines or scientific research, and offer courses in Romansh to integrate speakers of other languages.¹⁰⁴

The most striking feature of the Graubunden Language Law is Article 16, which sets out the directions for municipalities to decide on their official languages. The Article centers on the term “indigenous”, which is used in the English translation of the Swiss Constituti.¹⁰⁵ According to Article 16(2) of the Graubunden Language Law, municipalities with a share of at least 40 percent of speakers of an “indigenous” language, i.e. Romansh spoken in its traditional territories, will be deemed to be monolingual municipalities.¹⁰⁶ Such municipalities with a share of Romansh speakers of more than 20 percent will be deemed bilingual municipalities.¹⁰⁷ This is a very strong statement in favour of Romansh, since it allows Romansh to be the sole official language in a municipality, even if it is spoken by less than half of its population. This provision had been criticised by German speakers,¹⁰⁸ however it was deemed necessary by its proponents in order to protect the Romansh language from extinction in its traditional territories.¹⁰⁹

Swiss language policy involves federal, cantonal and municipal levels of state authorities and legislature. This allows for a very specific language law, which can pay close attention to the actual circumstances given in a specific region of the country. Provisions like the percentage rules regarding official languages in municipalities show that a high degree of importance is being placed on the maintenance and advancement of Romansh.

¹⁰⁰ Graubunden Language Law, n98 at Article 3.

¹⁰¹ Ibid, Article 3(5)

¹⁰² Lia Rumantscha, “Welcome” <www.liarumantscha.ch>.

¹⁰³ Graubunden Language Law, n98 at Article 11(1).

¹⁰⁴ Ibid, Article 12.

¹⁰⁵ Graubunden Language Law, n98 at Article 16; Swiss Constitution, n46 at Article 70(2).

¹⁰⁶ Ibid, Article 16(2).

¹⁰⁷ Ibid.

¹⁰⁸ A Cortesi, “Gegen die ‘Diskriminierung der Deutschsprachigen’” *Tagesanzeiger* (18 May 2007) <www.tagesanzeiger.ch>.

¹⁰⁹ Ibid.

THE SITUATION IN CANADA

Language Policy in Canada

The Canadian Charter of Rights and Freedoms [Canadian Charter] states that English and French are the official languages of Canada.¹¹⁰ However, “this shared official status applies only to Federal government institutions”,¹¹¹ such as Parliament, the Federal Administration and Federal Courts.¹¹² Provinces, municipalities and private businesses are generally not subject to official bilingualism.¹¹³

The root of Canada’s official bilingualism lies in its settlement by both French and English colonists.¹¹⁴ From the time of Confederation in 1867, both languages were used in Parliament. They did not, however, enjoy equal status.¹¹⁵ In the 1960s the Royal Commission on Bilingualism and Biculturalism [Royal Commission] was established to assess the situation around the two settler languages. The Royal Commission recommended that English and French be declared the official languages of Canada.¹¹⁶ The Official Languages Act was enacted in 1969. It recognised the equality of English and French in the Federal administration and permitted Canadian citizens to receive Federal services in their official language of choice.¹¹⁷ Since then, the Official Languages Act has undergone changes that are included in the new Official Languages Act 1988.¹¹⁸ The new Act was passed with regard to language rights that had been introduced by the Canadian Charter.¹¹⁹ ¹²⁰ The Canadian Charter had been included in the Canadian Constitution during its revision in 1982.¹²¹ Sections 16 to 20 state the equality of French and English languages, the right to use both languages in parliament or in the government of Canada,¹²² and the right to use either language in debates in the parliament and before federal courts.¹²³ Also, any materials produced by the Parliament of Canada shall be printed in both languages and have equal force.¹²⁴ Section 23 of the Canadian Charter also acknowledges the right of parents who speak a minority official language in the province of their residence to have their children educated in that minority language.¹²⁵ This right however is subject to there being enough citizens in the

¹¹⁰ Canadian Charter of Rights and Freedoms 1982 CA, s16 [Canadian Charter].

¹¹¹ Official Languages and Bilingualism Institute, “The Legal Context of Canada’s Official Languages”, Site for Language Management <www.slmc.uottawa.ca>.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Official Languages and Bilingualism Institute, “Linguistic History of Canada”, Site for Language Management <www.slmc.uottawa.ca>.

¹¹⁵ Office of the Commissioner of Official Languages “History of Official Languages” <<http://www.ocolclo.gc.ca>>.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Office of the Commissioner of Official Languages “History of the Official Languages Act” <www.ocolclo.gc.ca>; Official Languages Act 1988 (CA) [OCOL].

¹¹⁹ Canadian Charter, n110.

¹²⁰ OCOL, n118.

¹²¹ B Morse, “An Overview of Canadian Aboriginal Law”, in D Champagne (ed), *The Native North American Almanac*, Gale Research, Detroit, 2001.

¹²² Canadian Charter, n110 at s16.

¹²³ OCOL, n118.

¹²⁴ Ibid.

¹²⁵ Ibid; Canadian Charter, n110 at s23(1).

province with the same right to warrant the provision of the education in the minority official language.¹²⁶

In direct contrast to the above, Aboriginal languages are not recognised constitutionally. The Official Languages Act 1988 only refers to the English and French languages.¹²⁷ There has been some debate about whether the sections on native rights in the Canadian Charter also offer protection for Aboriginal languages.¹²⁸ The conclusion has generally been that even if the sections can be read to include the right of Aboriginal peoples to maintain their languages within their communities, they do not entitle Aboriginal peoples to financial aid from the government to promote their languages.¹²⁹

In 1971, the government of Canada introduced a policy of “multiculturalism”. This was to accommodate ethnic minorities such as Canadians of Ukrainian or German descent, who opposed the French minority population and its language receiving so much official recognition.¹³⁰ However, protecting Aboriginal peoples and their languages was not seriously considered under this policy.¹³¹

Some of Canada’s provinces and territories are more progressive with regard to Aboriginal languages. In the Northwest Territories, for example, seven official Aboriginal languages are identified in the Official Languages Act 1984. These languages acquired equal status to English and French when the Official Languages Act was revised in 1988.¹³²

The Situation of the Various Indigenous Language Families

There are three constitutionally recognised groups of Aboriginal peoples in Canada. They are the Indian, Inuit and Metis peoples.¹³³ Within the group referred to as “Indian”, certain Indians can be registered under the Indian Act and are referred to as “registered” or “status” Indians.¹³⁴ Aboriginal people who do not meet the criteria for registration are usually called “non-status” Indians.¹³⁵ Status and non-status Indians are also referred to generically as “First Nations” peoples.¹³⁶ The “Inuit” people are a distinct group of Aboriginal people living in the Arctic region of Canada,¹³⁷ and are excluded from registration under the Indian Act.¹³⁸ The term “Metis” grew out of two different groups of people with mixed ancestry, Aboriginal, and either English or French settler ancestry. The former were generally referred to as “Half-breeds”, the latter

¹²⁶ Canadian Charter, n110 at s23(3).

¹²⁷ Official Languages and Bilingualism Institute, “Native Languages of Canada: Legal Framework”, Site for Language Management Canada <www.slmc.uottawa.ca>.

¹²⁸ J Edwards (ed), *Language in Canada*, Cambridge University Press, Cambridge, 1998, 153.

¹²⁹ Ibid.

¹³⁰ Official Languages and Bilingualism Institute, “A Change in the Course of Language Rights (1963-1969)”, Site for Language Management, Canada <www.slmc.uottawa.ca>.

¹³¹ Ibid.

¹³² Edwards, n128 at 154.

¹³³ P Chartrand (ed), *Who are Canada’s Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Purich Publishing Ltd, Saskatoon (CA), 2002) at 41-42; Constitution Act, 1982, s35(2).

¹³⁴ Chartrand, *ibid*, 44; Indian Act RSC 1985 c I-5.

¹³⁵ Chartrand, *ibid*.

¹³⁶ “First Nations” Aboriginal Affairs and Northern Development Canada <www.aadnc-aadnc.gc.ca>.

¹³⁷ “Inuit” Aboriginal Affairs and Northern Development Canada <www.aadnc-aadnc.gc.ca>.

¹³⁸ Chartrand, n133 at 45.

according to the French term “Metis”. Over time, however, those two distinct groups have come to be regarded as one group under the common denominator “Metis”.¹³⁹ It has to be noted, however, that the understanding of who is Metis is still evolving.¹⁴⁰ With regard to such definitions, it is also important to remember that the division into different aboriginal groups, especially the division of First Nations people into “registered” or “non-registered” Indians under the Indian Act, is an imposition by the state which is at odds with indigenous peoples’ wish to self-identify who is an indigenous person.¹⁴¹

The Aboriginal population of Canada is extremely heterogeneous, with a diversity of languages. There are approximately 65 Aboriginal languages spoken in Canada.¹⁴² These languages can be grouped into 11 different language families and isolates.¹⁴³ Public appreciation of Aboriginal languages is low.¹⁴⁴ They are still perceived as primitive languages “without an elaborate grammar or vocabulary” by many,¹⁴⁵ even though their grammars and vocabularies are as intricate as other languages.¹⁴⁶

The 2006 census states that the number of First Nations people who speak an Aboriginal language remains steady at approximately 29 percent.¹⁴⁷ Of the Metis, approximately 4 percent were able to carry a conversation in an Aboriginal language, compared with 5 percent in the 2001 census, resulting in a decline of one percent.¹⁴⁸ The Inuit language is spoken in five different dialects: Inuvialuktun; Inuinnaqtun; Inuttit; Inuktitut; and Inuttut. The “Inuit language”, to use one term to encompass all of the dialects, has a large enough number of speakers to be considered viable.¹⁴⁹ However, knowledge and use of the Inuit language is declining. In the census of 2006, only 32,200 Inuit, 64 percent of the total population, reported that they speak the Inuit language as their mother tongue. This signifies a decline from 68 percent in 1996. The at-home use of the Inuit language, which is considered vital in ensuring transmission of the language to younger generations, has reduced from 58 percent in 1996, to 50 percent in 2006.¹⁵⁰

Statistical data therefore indicates that many Aboriginal people in Canada have lost the ability to converse in their own language, or, even worse, never actually gain competency in speaking their language in the first place. Although a steady number of First Nations people are still speaking an Aboriginal language, there is no reason to be joyful: 30 percent of people speaking an Aboriginal language highlights that 70 percent are not capable of conversing in their own language. Since languages are conveyors of

¹³⁹ Ibid, 84-87.

¹⁴⁰ Ibid, 103.

¹⁴¹ R Maaka and A Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand*, University of Otago Press, Dunedin, 2005, 160.

¹⁴² Official Languages and Bilingualism Institute, “Native Peoples and Languages”, Site for Language Management Canada <www.slmc.uottawa.ca>.

¹⁴³ Edwards, n128 at 144.

¹⁴⁴ Ibid, 125.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Statistics Canada *Aboriginal People in Canada in 2006: Inuit, Metis and First Nations, 2006 Census* (Minister of Industry, Ottawa, 2008) at 48 [2006 Census].

¹⁴⁸ Ibid, 37.

¹⁴⁹ Ibid, 28.

¹⁵⁰ Ibid.

culture, this must have a detrimental effect on the First Nations' sense of identity. The same can be said regarding the Metis, of which an even lower number of people are able to converse in an Aboriginal language. The Task Force is therefore correct to state in their report that "all languages, including those considered viable, are losing ground and are endangered".¹⁵¹

As pointed out above, the Aboriginal languages of Canada are not constitutionally recognised. Although it is the view of the Task Force that Aboriginal language rights are entrenched in section 35 of the Constitution Act 1982 and, therefore, fall under the Aboriginal rights that are recognised and affirmed under the Constitution Act 1982,¹⁵² they are nevertheless in danger of becoming extinct. This was what prompted the Aboriginal peoples in Canada to set up the Task Force on Indigenous Languages and Culture, in order to recommend ways of maintaining the languages. One recommendation centered upon the enacting of legislation by Canada to recognise, protect and promote its Aboriginal languages.¹⁵³ This recommendation was based on the belief that raising the status would positively enhance the way people perceived it. The Task Force states that languages that are perceived as being "held in high regard"¹⁵⁴ enjoy more interest and are spoken more than languages which are perceived as being less valuable.¹⁵⁵ The shift of many Aboriginal young people towards English can certainly be attributed to their perceiving aboriginal languages as lesser languages.

While the Task Force's recommendation only goes as far as implementing legislation to protect Aboriginal languages, the gaining of official status would be of maximum benefit. It would elevate the languages publically and be an important first step towards ensuring the maintenance of the languages. It would show a commitment by the state to using aboriginal languages in its communications with aboriginal people. This desire for official recognition was also prevalent in the efforts of the Romansh speaking Swiss population, and te reo Maori speakers, and resulted in both being declared official languages.

Nunavut as an example of a Progressive Language Policy

(i) The creation of Nunavut and its current situation

Canada's youngest territory, Nunavut, was created by the Nunavut Land Claim Agreement,¹⁵⁶ signed between the Inuit people and the Canadian Prime Minister, in May 1993.¹⁵⁷ The term "Nunavut" means "our land" in Inuktitut.¹⁵⁸ The desire to create a new territory under the self-government of the Inuit people began in the 1970s. At first it centered on claiming back land for the Inuit people, however, this then evolved into a

¹⁵¹ *Task Force Report*, n14 at iii.

¹⁵² *Ibid*, v; Constitution Act 1982, n133 at s35(1).

¹⁵³ *Ibid*, 79.

¹⁵⁴ *Ibid*, 75.

¹⁵⁵ *Ibid*.

¹⁵⁶ Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (signed 25 May 1993).

¹⁵⁷ A Kersey, "The Nunavut Agreement: A Model for Preserving Indigenous Rights", (1994) 11 *Ariz J Intl & Comp L*, 429.

¹⁵⁸ Maaka and Fleras, n141 at 192.

desire for self-government for the Inuit people.¹⁵⁹ “The sustaining vision of Nunavut is a society with full control over its culture and language, its resources and environment.”¹⁶⁰ The creation of a new territory was perceived as a big step forward for the Inuit people. As the Inuk leader John Amagoalik stated: “No other land claim has involved creating a new territory with our own government. It is a victory. We’ve achieved what other aboriginal people can only dream about”.¹⁶¹ The creation of the Nunavut territory gave the Inuit political control, since they constituted the majority of population in the territory, comprising 85 percent of the population, which would be mirrored in their having controlling legislative powers.¹⁶²

Even though the creation of Nunavut has been perceived as a victory by some,¹⁶³ others see Nunavut as “a largely artificial construct without the critical tax base to be self-sufficient and lacking any productive economic enterprise to foster wealth creation”.¹⁶⁴ These critics see the vision of Nunavut as being dependent on Federal funding.¹⁶⁵ Also, social and economic problems were seen for the new territory with its high costs of living, high unemployment and high suicide rates.¹⁶⁶ Still, there are optimistic voices belonging to the Inuit people themselves. Paul Okalik, former Premier of Nunavut, acknowledges that Nunavut is facing difficulties caused by the abrupt change of lifestyle when Inuit first came into contact with non-Inuit. He says: “To this day, many continue to face personal turmoil as they are torn between two worlds”.¹⁶⁷ Nevertheless, Okalik sees the creation of Nunavut as a way to guarantee the rights of self-government so crucial to the Inuit people when pursuing their land claims agreement.¹⁶⁸ Nunavut also has natural wealth. Resources such as gold, oil and natural gas, as well as fish and wild game, offer great opportunities for economic expansion and allow the Inuit people “to engage the outside world on our own terms, in our own language and through our traditional values”.¹⁶⁹

The creation of Canada’s youngest territory has benefitted the Inuktitut language, which has been elevated to being one of three official languages. The loss of the Inuit language and the consequent fear for their culture was one of the main reasons the Inuit people entered into land claim negotiations.¹⁷⁰ After first adopting the “Official Languages Act 1988 of the Northwest Territories” [NTOLA], of which Nunavut was a part before becoming its own territory in 1999, Nunavut created its own “Official Languages Act” [OLA Nunavut] which was passed in the Nunavut legislature in 2008.¹⁷¹ Because the OLA Nunavut diminished the rights of other languages, which had been official

¹⁵⁹ Ibid, 193.

¹⁶⁰ Ibid.

¹⁶¹ Kersey, n157 at 429.

¹⁶² Ibid, 455; Maaka and Fleras, n141 at 194.

¹⁶³ Kersey, n157 at 429.

¹⁶⁴ Maaka and Fleras, n141 at 194.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ P Okalik, “Nunavut: The Road to Indigenous Sovereignty”, (2007) 2 *Intercultural Hum. Rts. L. Rev.* 11, 13.

¹⁶⁸ Ibid, 14.

¹⁶⁹ Ibid, 18.

¹⁷⁰ A Timpson, “Reconciling Indigenous and Settler Language Interests: Language Policy Initiatives in Nunavut”, (2009) 43(2) *Journal of Canadian Studies*, 161.

¹⁷¹ “Nunavut Politicians Pass New Official Languages Act”, *CBC News*, 4 June 2008.

languages under the NTOLA, it had to receive parliamentary concurrence.¹⁷² This concurrence was given in June 2009.¹⁷³ Unfortunately, the Act has still not been fully implemented.¹⁷⁴

Nunavut has elevated the Inuit language to an official language and has also created the Inuit Language Protection Act [ILPA Nunavut], which came into force in 2008.¹⁷⁵ This Act is “the only Act in Canada that aims to protect and revitalize a first peoples’ language”.¹⁷⁶ The ILPA Nunavut has also not been fully implemented.¹⁷⁷ Nevertheless, the provisions of the two Acts offer a new approach to the protection of Aboriginal languages, and, if successfully implemented they “could signal the development of a more exciting, complex, and diverse approach to official language politics in Canada that integrates the protection and promotion of Indigenous and settler languages”.¹⁷⁸

(ii) The Official Languages Act [OLA Nunavut] and the Inuit Language Protection Act [ILPA Nunavut]

OLA Nunavut elevates Inuit, comprising as a single term the two dialects Inuktitut and Innuinaqtun,¹⁷⁹ to an official language alongside English and French. It is equal in status to English and French.¹⁸⁰ The status of “official” language allows the Inuit language to be used in debates in the Legislative Assembly¹⁸¹ and in judicial and quasi-judicial proceedings.¹⁸² It may also be used to communicate with the head and central service offices of a territorial institution, and with other offices if there is a significant demand for communication in an official language.¹⁸³ The preamble of OLA Nunavut states the importance of the Inuit people and their language by declaring the presence of the Inuit people in the territory to be a fundamental characteristic of Canada.¹⁸⁴ Reference is made to past times when the Inuit language was “legally, socially and culturally subordinated in government and elsewhere”,¹⁸⁵ as being reversed by OLA Nunavut. However, the Inuit language is not pushed as strongly as might have been expected given the history of Aboriginal language marginalisation. Legislation is made, printed and published in English and French, whereas an Inuit version is only published by order of the Commissioner in Executive Council.¹⁸⁶

¹⁷² “History of Nunavut’s Language Laws”, Office of the Language Commissioner of Nunavut, <<http://langcom.nu.ca>>.

¹⁷³ Ibid.

¹⁷⁴ See: “Nunavut’s CLEY department re-names, re-shapes itself” (4 June 2012) Nunatsiaq Online <www.nunatsiaqonline.ca>; see also S Rogers, “Nunavut language laws a ‘priority,’ Aariak says” (1 November 2011) *Nunatsiaq Online* <www.nunatsiaqonline.ca>.

¹⁷⁵ Timpson, n170 at 160.

¹⁷⁶ “Nunavut’s Official Languages: Inuit Language Protection Act”, Office of the Language Commissioner of Nunavut, <<http://langcom.nu.ca>>.

¹⁷⁷ Ibid.

¹⁷⁸ Timpson, n170 at 176.

¹⁷⁹ Official Languages Act 2008 Nu 2008 c10 at s1 [OLA Nunavut]; Inuit Language Protection Act 2008 Nu 2008 c17, at s2 [ILPA Nunavut].

¹⁸⁰ Ibid, OLA Nunavut, s3.

¹⁸¹ Ibid, s4(1).

¹⁸² Ibid, s8(1) and s9(1).

¹⁸³ Ibid, s12 (2) and (3).

¹⁸⁴ Ibid, 1.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid, s5(1) and (3).

The ILPA Nunavut in its preamble refers to the past government policy of assimilation and the perception of the Inuit language as being inferior to English and French.¹⁸⁷ It states that these actions and attitudes have had a negative effect on the Inuit language.¹⁸⁸ The ILPA Nunavut was designed to ensure the viability of the Inuit language.¹⁸⁹ It contains provisions regarding the use of the Inuit language in communications and services by public sector bodies and private sector bodies, as well as the use of the language in education and as the language of the work place in territorial institutions.¹⁹⁰ The different provisions are to be implemented gradually after 2008. The aim of the government was for Nunavut to become a bilingual society in Inuktitut and English by 2020, while still respecting the needs of the French speakers and with Inuktitut as the language of the work place.¹⁹¹ Use of the Inuit language as the language of work in territorial institutions is a right, and territorial institutions have a statutory duty to increase the use of the Inuit language in the work place.¹⁹² Use of the Inuit language is also enforced in public and private sector entities, which have to use the language in essential services, such as emergency, rescue or health services, and also when offering hospitality services in a hotel or restaurant.¹⁹³

(iii) The effects of the Official Languages Act and the Inuit Language Protection Act

By creating these policies which link official recognition of an Aboriginal language with measures to advance it, Nunavut is a pioneer and provides a new role model for the language policy of Canada.¹⁹⁴ Little is known about how effective such policies are in maintaining and advancing other Aboriginal languages.¹⁹⁵ The policies drafted by Nunavut are, however, of interest to other Aboriginal peoples in Canada, and indigenous peoples worldwide who are trying to revitalise and maintain their languages.¹⁹⁶ In these circumstances, a comparison with Romansh and the policies put in place to protect Romansh is extremely valuable.

As stated above,¹⁹⁷ Romansh is in a similar situation to Aboriginal languages such as Inuit. Therefore, it is not surprising that the language policies for Nunavut and Romansh both emphasise the languages being used in everyday life. With regard to Romansh, specific municipalities being declared unilingual Romansh speaking municipalities, guarantees language use. In Nunavut, the daily use is fostered by obligatory use of Inuit in important services such as health and hospitality, as well as the use of Inuit in the work place.

¹⁸⁷ ILPA Nunavut, n179 at 1.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Timpson, n170 at 162.

¹⁹² ILPA Nunavut, n179 at s12.

¹⁹³ *Ibid.*, s3(2); "Inuit Language Protection Act" Office of the Language Commissioner of Nunavut <www.langcomm.nu.ca>.

¹⁹⁴ Timpson, n170 at 160.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

Whether the official status and the policies put in place to protect the Inuit language actually help to maintain the language still has to be seen. On the other hand, the official status of Romansh and the legislative work enacted on both the federal and cantonal level to protect and maintain Romansh seems to have benefitted the language. The first results of the latest census from 2010 with regard to religion and languages show that the percentage of Romansh speakers has remained stable at 0.6 percent when compared to the census from 2000.¹⁹⁸ Halting the steady decline of Romansh since the end of the 19th Century¹⁹⁹ has to be seen as success, and show that policies aimed at maintaining languages can go a long way in sustaining them. These results support the Inuit language also being recognised as an official language at the federal level.

(iv) The Inuit Language as an Official Language at the Federal Level

a. Possible Objections to Granting Official Status

Granting federal official status to the Inuit language would mean that Inuit people could use their language when communicating with the Federal government. They could use it before Federal Courts or in Parliament, and legislation would have to be issued in the Inuit language. They could also ask for education of their children in their language if they were residing in provinces or territories where their language constituted the minority language.

A major objection to official recognition of an indigenous language is the expense to the state. This was countered by the Waitangi Tribunal in Aotearoa New Zealand, as follows:²⁰⁰

This objection pre-supposes that by official recognition all public documents statutes, regulations, public notices, perhaps even street signs should be published in both languages. We do not agree. The extent to which official recognition would require efforts of this kind will depend upon subject-matter, locality, audience and other factors as well as costs.

As with Romansh, the Inuit language could be limited to communications between its speakers and the federal institutions or to only issuing certain legislation in the Inuit language. This is already the case in Nunavut, anyway, where legislation is mainly passed in English and French.²⁰¹

b. The Pilot Project of the Canadian Senate as Inspiration

The Senate of Canada recently introduced a pilot project allowing Inuktitut to be spoken in the senate.²⁰² The Standing Committee on Rules, Procedures and the Rights of Parliament [Standing Committee] recommended the use of Inuktitut in the Senate

¹⁹⁸ Bundesamt für Statistik BFS, “Ein Funftel der Bewohnerinnen und Bewohner ist konfessionslos“ (press release, 19 June 2012) at 1.

¹⁹⁹ Furer, n45 at 17.

²⁰⁰ *Te Reo Maori Report*, n26 at 5.6.

²⁰¹ OLA Nunavut, n179 s5(1).

²⁰² The Standing Committee on Rules, Procedures and the Rights of Parliament “Fifth Report” (9 April 2008) Parliament of Canada <www.parl.gc.ca>.

chamber and also recommended allowing the use of other aboriginal languages in the Senate chamber.²⁰³ These recommendations were based on the findings that:

... use of Aboriginal languages in the Senate would constitute recognition of their unique status in Canada. Canada's Aboriginal peoples were here long before the arrival of the Europeans, and have never been conquered.

The Committee believed that the use of Inuktitut in the Senate chamber would be “a positive way of affirming the legitimacy of these languages”.²⁰⁴ The Committee also expressed concern about the viability of the languages and pointed out that “allowing the use of aboriginal languages on the floor of the Senate would send a powerful message about the importance that we attach to them”.²⁰⁵ These strong statements from a Federal government committee support the argument for making aboriginal languages “official” languages. Similar views were expressed by the Waitangi Tribunal when considering official status for te reo Maori. It was stated that te reo Maori, “is, after all, the first language of the country, the language of the original inhabitants”.²⁰⁶ Such statements acknowledge the longstanding Aboriginal desire for their languages, which are the first spoken on the territories of modern nation states such as Canada, to be saved from extinction, and, instead treated as valuable assets of the state. Speaking Inuktitut in the Senate of Canada would be an enormous achievement. It would pave the way for the official language status of Inuktitut and acknowledge the Aboriginal heritage of Canada.

(v) Is Official Status for All Aboriginal Languages Possible?

Inuktitut is one of approximately, 60, aboriginal languages present in Canada. The prospect of making them all official languages is daunting. Regarding the feasibility of letting other aboriginal languages be spoken in the Senate, the Committee came to the conclusion that “there may be significant practical barriers relating to aboriginal languages or dialects that do not have a significant population of current speakers”. Although this may be lamentable, it is also understandable that it might be very difficult to allow for translation of a language only spoken by a few hundred speakers. The same approach could apply to recognising aboriginal languages as official languages at a Federal level.

Technical equality to English and French on a Federal level would elevate the status of the aboriginal languages, show a commitment of the Canadian state to its Aboriginal people, and would distinguish aboriginal languages from other immigrant languages. If official recognition was coupled with measures to advance the languages such as exists in Nunavut, it would reinforce the survival of aboriginal languages.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ *Te Reo Maori Report*, n26 at 1.

CONCLUSION

Switzerland and Canada both have more than one official language. However, although Canada grants its two colonial languages official status, it does not similarly acknowledge its aboriginal languages. In fact, Canada has long counted itself as being founded by its two “immigrant” peoples.²⁰⁷ This view was later slightly changed to a policy of multiculturalism, which recognised all ethnic groups as being equal in value.²⁰⁸ Although the importance of aboriginal language rights is at least being acknowledged,²⁰⁹ and the Senate’s pilot project is promising, the focus at the Federal level is still only on English and French.

In comparison, Switzerland actively acknowledges its different languages. The concept of one single national language for the whole state was dismissed at confederation and instead four national languages were implemented. The intention was to constitute a united Swiss state without assimilating any of the different parties to the state.²¹⁰ The consideration given to Romansh from an early point in time has led to various acts of enforcement of the language, such as declaring it a national language as well as an official language, albeit with certain restrictions. These efforts clearly helped the Romansh language to survive, and, even more important, it gave the Romansh language the respect it deserves.

Similarly, making aboriginal languages official languages at the Federal level would be a significant first step in preserving the languages. It would also signify that Canada acknowledges the heritage of its aboriginal peoples as part of its history and gives them, and their languages, the respect they deserve.

²⁰⁷ *OCOL Annual Report*, n42 at 4.

²⁰⁸ *Ibid*, 34.

²⁰⁹ *Ibid*.

²¹⁰ *Botschaft Sprachenartikel*, n72 at 310.

AN INDIGENOUS VOICE AT WIPO?

Valmaine Toki*

INTRODUCTION

The demands for the recognition of rights for Indigenous peoples over time has led to the emergence of a common body of opinion based on long standing principles of international human rights law and policy.¹ The existence of these rights for Indigenous people is unequivocal. The road to recognition has been arduous. The United Nations Declaration on the Rights of Indigenous Peoples [the Declaration] is the only international instrument that views Indigenous rights through an indigenous lens,² crystallising many of the fundamental human rights of Indigenous peoples. The Declaration provides a framework and benchmark for the United Nations Permanent Forum on Indigenous Issues [the Permanent Forum].

This note reviews the background to the Declaration, and examines the role of the Permanent Forum, highlighting the connection between the two with a case study on intellectual property rights. It also offers comments about the future of Indigenous rights and the role of the Permanent Forum in promoting them.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The Declaration was the initiative of the Working Group on Indigenous Populations [WGIP], which was established in 1982. The mandate of WGIP was to develop international standards concerning Indigenous peoples' rights. The Declaration was to manifest this mandate by providing a clear articulation of international standards on the rights of Indigenous peoples. It was not until 25 years later, in September 2007, however, that the final text was adopted by the General Assembly by a majority of 143 states. Eleven states abstained.³ Four states opposed adoption: Australia; Canada; the United States of America [United States]; and, New Zealand. This position has now changed, with Australia⁴, New Zealand⁵, Canada⁶ and the United States⁷ all signaling

* Valmaine Toki is Vice-Chairperson of the United Nations Permanent Forum on Indigenous Issues and a legal academic at the Faculty of Law, University of Waikato, Aotearoa New Zealand.

¹ A/66/288 Rights of indigenous peoples, 10 August 2011, para 62.

² United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/61/L.67 (2007) [the Declaration]. ILO Convention 107 and 169 also recognise indigenous rights. However unlike the ILO Conventions 107 and 169, the Declaration has been adopted and/or endorsed by a majority of States.

³ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

⁴ See "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" <http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx>.

⁵ See "New Zealand Statement of Support for the Declaration" <www.converge.org.nz/pma/NZ%20UNDRIP%20statements.pdf>.

⁶ See Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp#tphp>>.

⁷ See Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous People. Available at <<http://www.usun.state.gov>>.

support for the Declaration. This support means that, arguably, the Declaration now enjoys a more robust position in these countries, by setting a benchmark against which to measure minimum standards for recognition of Indigenous Rights.

UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

The Declaration is the guiding instrument for the Permanent Forum, which is an advisory body to the United Nations Economic and Social Council [ECOSOC]. The Permanent Forum is tasked with promoting respect for, and full application of, the provisions of the Declaration, and with following up on its effectiveness.⁸

The genesis of the Permanent Forum began with discussions at the World Conference in Vienna in 1993. The subsequent Vienna Declaration and Programme of Action recommended that such a body be established within the first United Nations International Decade of the World's Indigenous People. A working group was formed to achieve this. Against the growing awareness and recognition of the importance of rights for Indigenous peoples amongst governments and within the United Nations system, the Permanent Forum was eventually established on 28 July 2000.⁹

The Permanent Forum provides expert advice and recommendations to ECOSOC, within the mandated areas of economic and social development, culture, the environment, education, health and human rights. The Permanent Forum is also tasked with raising awareness and promoting the integration and coordination, preparation and dissemination of information on Indigenous issues.

The Permanent Forum is one of three United Nations bodies that are specifically mandated to investigate Indigenous peoples' issues. The other two bodies are the United Nations Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur Rights of Indigenous Peoples.

The Permanent Forum comprises sixteen representatives, eight members are state elected and eight are Indigenous nominated. The State elected members are nominated by governments and then elected by ECOSOC based on the five regional groupings used at the United Nations. They are: Africa; Asia; Eastern Europe; Latin America and the Caribbean; and, Western Europe and Other States. The eight Indigenous nominations are appointed by the President of ECOSOC and represent the seven socio-cultural regions determined to give broad representation to the world's indigenous peoples. These regions are: Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; the Pacific; and, one additional rotating seat among the three first listed above. During the current 2011–2013 term the rotating seat was filled by Central and South America and the Caribbean, and in the 2013–2016 term by Central Asia and Transcaucasia.

⁸ Article 42 of the Declaration.

⁹ ECOSOC Resolution E/2000/22.

The first meeting of the Permanent Forum was held in May 2002 and subsequent annual two-week sessions take place in New York. Following each session the Forum formulates substantive recommendations to governments, the United Nations system and Indigenous people. These recommendations are tabled with ECOSOC and eventually adopted by the United Nations Human Rights Council, which provides a very high level endorsement.

To support and promote the mandate of the Permanent Forum, the Inter-Agency Support Group [IASG] on Indigenous Issues was established. The IASG comprises thirty-one members, including the United Nations Development Program [UNDP]; the Secretariat for the Convention on Biological Diversity [CBD]; the World Bank; the European Union; the United Nations Environment Programme [UNEP]; the World Health Organisation [WHO]; the Office of the United Nations High Commissioner for Human Rights [OHCHR]; and, the World Intellectual Property Office [WIPO].

The mandate of the IASG was subsequently expanded to include support for indigenous related mandates throughout the inter-governmental system. The effect of this expansion allows the United Nations system and other intergovernmental organizations to analyse recommendations made by the Permanent Forum with a view to facilitating comprehensive and coordinated responses.

In an effort to address many of the issues faced by Indigenous people each year the Permanent Forum provides a theme to be discussed during the two-week session. Past themes have included “Indigenous Women and Gender” during the third session, “Millennium Development Goals” during the fourth and fifth session, and, in the recent session, “the Doctrine of Discovery”.

ISSUES AND CASE STUDIES

Each member of the Permanent Forum chooses a portfolio, and, in addition to their major portfolio, contributes to four additional portfolios. Each portfolio corresponds to a support agency, so that, for instance, the Traditional Knowledge portfolio holder liaises with the World Intellectual Property Organization, and the Environmental portfolio holder liaises with the United Nations Environment Programme.

WIPO

The recent Wai 262 Report produced by the Waitangi Tribunal¹⁰ and the current initiatives proposed by WIPO to capture Indigenous knowledge, make it timely to consider the role of the Permanent Forum and the effect of the Forum’s recommendations from the eleventh session held in New York during May, 2012.¹¹

WIPO was established in 1967. It is a specialised United Nations agency with 185 Member States. The mission of WIPO is to “promote innovation and creativity for the

¹⁰ *Ko Aotearoa Tenei: a Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*. Available at <http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp>.

¹¹ United Nations Permanent Forum on Indigenous Issues Report of the eleventh session held 7-18 May, 2012. E/2012/43-E/C.19/2012/13.

economic social and cultural development of all countries through a balanced and effective international intellectual property system". The Traditional Knowledge section was established in 1998. Indigenous participation at WIPO has been focused on ensuring, first, that adequate measures against misuse and misappropriation of their traditional knowledge, genetic resources and traditional cultural expressions, are developed together, and second, that indigenous peoples receive an equitable share of any resulting commercial benefits.

The WIPO Inter Governmental Committee [IGC] was established by the WIPO General Assembly in 2000, to provide a forum for States to discuss intellectual property issues relating to traditional knowledge, genetic resources and traditional cultural expressions. In 2009, the WIPO General Assembly authorised the IGC to undertake negotiations with the intention of reaching an agreement on the text of an international instrument to protect traditional knowledge, genetic resources and traditional cultural expressions. The WIPO IGC is currently drafting three texts to capture and control the use and dissemination of traditional knowledge, genetic resources and traditional cultural expressions.

Notwithstanding the participation of Indigenous peoples within the WIPO IGC, their "standing" is not equivalent to that of a Member State. The comments on the three texts provided by Indigenous participants cannot be accepted by the WIPO IGC unless support is offered by a Member State. Furthermore, Indigenous peoples are not accorded any voting rights. These are crucial issues because once agreement is reached on the three texts by the WIPO IGC it will provide the basis for an international legally binding instrument to control, protect and develop traditional knowledge, genetic resources and cultural expressions.

Whilst WIPO recognises traditional knowledge, genetic resources and cultural expressions as being economic and cultural assets that belong to indigenous and local communities and their countries, the role of indigenous peoples within this process is limited. During the recent eleventh session of the Permanent Forum in New York, held in May, 2012, WIPO provided a half-day session articulating the role of WIPO and how the rights for indigenous peoples are considered and implemented. During this session many Indigenous Organisations provided interventions for the consideration of the Permanent Forum. In drafting these three texts, WIPO seeks to address the role that intellectual property principles and systems can play in protecting traditional knowledge, genetic resources and cultural expressions from misappropriation, providing support for generating benefits (including the equitable sharing of the benefits produced as a result of commercialisation) and, strengthening the role of intellectual property in providing access to, and benefit-sharing in, genetic resources.¹²

WHAT IS WRONG WITH THE WIPO PROCESS?

For Maori, as an indigenous people, various threads provide a clear recognition for rights to their cultural heritage, traditional knowledge, treasures and all manifestations

¹² For example, whether in the future Maori should apply to WIPO for protection of matauranga such as rongoa and waiata.

termed “intellectual property”. Article 2 of the Treaty of Waitangi guaranteed to Maori exclusive possession of their taonga (treasure). Article 31 of the United Nations Declaration on the Rights of Indigenous People recognises that Maori, as Indigenous People, have a right to maintain, control and protect their culture.

Article 31 of the Declaration provides:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 3, the Declaration’s most notable provision, states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 31, when read together with Article 3, provides that indigenous people, including Maori, have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the right to freely determine and pursue their cultural development. Furthermore, the State should undertake measures to ensure these rights are recognised and protected. Unless these rights have been clearly extinguished by agreement with the rights holder, through legislation, or by another means, these rights still remain.

The process undertaken by WIPO is procedurally defective in that it fails to provide a mechanism whereby Indigenous Peoples are able to participate meaningfully in the process when the subject of the texts (for instance traditional knowledge) derives from, and belongs to, indigenous peoples. The process fails to substantively recognise the intrinsic rights indigenous peoples have to their treasures, culture and traditional knowledge (matauranga).

PERMANENT FORUM RECOMMENDATIONS TO IMPROVE THE PROCESS

Following on from the interventions provided by the Indigenous organisations and States, and the session provided by WIPO, the relevant Permanent Forum recommendations formulated included:¹³

46. The Permanent Forum recommends that WIPO seek the participation of experts on international human rights law specifically concerning indigenous peoples so that they provide input into the substantive consultation process, in particular with reference to the language in the draft text where indigenous peoples are “beneficiaries” and other language that refers to indigenous peoples as “communities” as well as the general alignment of the draft text of the Intergovernmental Committee with international human rights norms and principles.

47. The Permanent Forum *demands* that WIPO recognize and respect the applicability and relevance of the United Nations Declaration on the Rights of Indigenous Peoples as a significant international human rights instrument that must inform the Intergovernmental Committee process and overall work of WIPO. The minimum standards reflected in the Declaration must either be exceeded or directly incorporated into any and all WIPO instruments that directly or indirectly impact the human rights of indigenous peoples.

49. The Permanent Forum *welcomes* the decision of the Intergovernmental Committee to organize, in cooperation, with the Forum, expert preparatory meetings on the Intergovernmental Committee process for indigenous peoples representing the seven geopolitical regions recognize by the Forum.

50. The Permanent Forum *requests* that WIPO commission a technical review to be conducted by an indigenous expert, focusing on the draft texts concerning traditional knowledge, genetic resources and traditional cultural expressions, and to provide comments thereon to the Intergovernmental Committee through the Forum. The review should be undertaken within the framework of indigenous human rights

51. The Permanent Forum *calls upon* States to organize regional and national consultations to enable indigenous peoples to prepare for and participate effectively in sessions of the Intergovernmental Committee.

52. Consistent with *article 18* of the United Nations Declaration on the Rights of Indigenous Peoples, the Permanent Forum requests member States to explore and establish modalities to ensure the equal, full and direct participation of indigenous peoples in all negotiations of the Intergovernmental Committee.

53. As highlighted in *article 31* of the Declaration, the Permanent Forum *requests* that both WIPO and States take effective measures and to establish mechanisms to recognize the right of indigenous peoples to protect their intellectual property, including their cultural heritage, traditional knowledge an traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts.

¹³ E/2012/43-E/C.19/2012/13.

54. The Permanent Forum *calls upon* WIPO to strengthen its efforts to reach out to indigenous peoples and to continue to provide practical assistance and capacity strengthening for and in cooperation with indigenous peoples.

55. The Permanent Forum *calls upon* the Intergovernmental Committee to appoint representatives of indigenous peoples as members of any Friends of the Chair groups and as co-chairs of any working groups and drafting groups that may be established by the Committee. It also calls upon the Committee to appoint an indigenous person as a co-chair of the Committee as a whole (my emphasis).

WIPO recognise that the process is problematic and in response these recommendations employ strong language, such as “demand”¹⁴ “calls upon”¹⁵ “requests”¹⁶. Furthermore, onus is placed on the relevant articles of the Declaration¹⁷ to support the participation of indigenous peoples in the WIPO IGC negotiations as a procedural right, as well as recognising the substantive right of indigenous peoples to their intellectual property.

IMPLEMENTATION OF THE RECOMMENDATIONS

The Declaration explicitly states that the specialised agencies of the United Nations system, such as WIPO, “shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of Indigenous peoples on issues affecting them shall also be established”.¹⁸

Members of the Permanent Forum dialogue with United Nations agencies at the highest level. This communication is pivotal in order to reinforce the basic rights contained within the Declaration and to ensure that they are incorporated into the policies and processes of United Nations Agencies. Furthermore, dialogue allows for the possibility to formulate recommendations with United Nations Agencies that can be promptly implemented.

The twenty-second session of the WIPO IGC provided an opportunity for the Permanent Forum to contribute to the Indigenous Panel. The following submission was made at the WIPO IGC in July, 2012:

... At its eleventh session in May this year, the Forum held an in-depth dialogue with WIPO. The Forum commends the work of the IGC and expresses appreciation for WIPO's activities in support of indigenous peoples.

The Forum developed recommendations addressed to WIPO, contained in document E/C.19/2012/L.4, ... I would like to request that the document be reflected in the report of this session and issued as an INF document for IGC 23 and the WIPO General Assembly, through a Member State, in October this year.

In summary, the Forum recommends the following:

¹⁴ See recommendation 47.

¹⁵ See recommendation 51.

¹⁶ See recommendation 50.

¹⁷ See recommendation 52 and 53 emphasising articles 18 and 31 of the Declaration.

¹⁸ Article 41 of the Declaration.

For WIPO to seek the participation of experts on international human rights law specifically concerning indigenous peoples to ensure the alignment of the IGC draft texts with international human rights norms.

For WIPO to respect and recognise the United Nations Declaration on the Rights of Indigenous Peoples as a significant international instrument that must inform the IGC process and the overall work of WIPO.

Other recommendations include the undertaking of a study to examine the challenges in the African region on protecting GR, TK and TCEs; the organization of expert preparatory meetings of indigenous peoples on the IGC; the commissioning of a technical review by an indigenous expert of the draft texts on GR, TK and TCEs, that would feed into the IGC process; and, the establishment of modalities to ensure effective participation by indigenous peoples in the IGC process, including by appointing an indigenous representative as Co-Chair of the IGC.”

Although the Permanent Forum’s recommendations were submitted to WIPO IGC for inclusion there was no State support. Without the support of at least one State within the WIPO IGC any contribution or intervention from Indigenous participants will not be considered.

The Permanent Forum recommendations specific to WIPO that did not require the support of the WIPO IGC, will, nevertheless, still be implemented. They included:

46. The Permanent Forum recommends that WIPO seek the participation of experts on international human rights law specifically concerning indigenous peoples so that they provide input into the substantive consultation process, in particular with reference to the language in the draft text where indigenous peoples are “beneficiaries” and other language that refers to indigenous peoples as “communities” as well as the general alignment of the draft text of the Intergovernmental Committee with international human rights norms and principles.

47. The Permanent Forum demands that WIPO recognize and respect the applicability and relevance of the United Nations Declaration on the Rights of Indigenous Peoples as a significant international human rights instrument that must inform the Intergovernmental Committee process and overall work of WIPO. The minimum standards reflected in the Declaration must either be exceeded or directly incorporated into any and all WIPO instruments that directly or indirectly impact the human rights of indigenous peoples.

49. The Permanent Forum welcomes the decision of the Intergovernmental Committee to organize, in cooperation, with the Forum, expert preparatory meetings on the Intergovernmental Committee process for indigenous peoples representing the seven geopolitical regions recognize by the Forum

53. As highlighted in article 31 of the Declaration, the Permanent Forum requests that both WIPO and States take effective measures and to establish mechanisms to recognize the right of indigenous peoples to protect their intellectual property, including their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral

traditions, literatures, designs, sports and traditional games, and visual and performing arts.

54. The Permanent Forum calls upon WIPO to strengthen its efforts to reach out to indigenous peoples and to continue to provide practical assistance and capacity strengthening for and in cooperation with indigenous peoples.

The Expert Group recommendation has since been realised. This has enabled experts from the seven regions to meet prior to each WIPO IGC to strategise on amendments to the texts and to lobby states to support amendments. During the July 2013, WIPO IGC, it was encouraging to see that Australia supported many of the proposed interventions and amendments from Indigenous members as many States still do not recognise the Declaration and its importance within this forum.

THE FUTURE OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

The opportunity to work with other forums, including the United Nations Expert Mechanism on the Rights of Indigenous People, and the Special Rapporteur on the Rights of Indigenous People, can collectively provide greater momentum for gaining recognition of Indigenous Rights. The ability of the UNPFII to engage in high-level dialogue is a key to promoting Indigenous rights.

There is growing awareness of Indigenous Rights throughout the world. The role of the Permanent Forum is pivotal to developing greater awareness. There are many areas yet to be explored. The support of the IASG and relevant Agencies, together with the collective approach of the Special Rapporteur and the Expert Mechanism on the Rights of Indigenous Peoples can, as noted by the Special Rapporteur, “assist to harmonise the myriad of activities within the United Nations system”¹⁹. Driven by the Declaration, this provides an exciting space in which to explore the establishment of Indigenous Advisory Groups to assist and promote the recognition of Indigenous Rights within the workings and policy of these Agencies.

¹⁹ See Statement by James Anaya Special Rapporteur on the Rights of Indigenous Peoples 67th session of the General Assembly, Third committee, New York, 22 October 2012.

OBSERVERS REPORT ON THE RIGHTS OF THE RAPA NUI PEOPLE ON EASTER ISLAND

Clem Chartier, Alberto Chirif, Nin Tomas*

The Report that follows is reproduced in full with the permission of the Observatorio Ciudadano, Chile.

The original page numbers of the Report have been supplemented by the page numbers of the Journal. This provides continuity of presentation and layout, and easy referencing within the format of the Journal.

* Clem Chartier is President of the Metis National Council in Canada, Alberto Chirif is an Anthropological Researcher from Peru, and Nin Tomas is a Researcher of Indigenous Peoples Rights from Aotearoa New Zealand.

THE HUMAN RIGHTS OF THE RAPA NUI PEOPLE ON EASTER ISLAND

Rapa Nui



IWGIA report 15

THE HUMAN RIGHTS OF THE RAPA NUI PEOPLE ON EASTER ISLAND

Observer's Report visit to Rapa Nui 2011

OBSERVERS:

Clem Chartier, President of Métis National Council, Canada.

Alberto Chirif, Anthropologist and Researcher, IWGIA, Peru.

Nin Tomas, Associate Professor of Law at the University of Auckland in Aotearoa-New Zealand, and researcher in the area of Indigenous Peoples Rights.

Rapa Nui: August 1 - 3, 2011

Santiago: August 4 - 8, 2011

Report 15
IWGIA - 2012

THE HUMAN RIGHTS OF THE
RAPA NUI PEOPLE ON EASTER ISLAND
Observer's Report visit to Rapa Nui 2011

ISBN: 978-87-92786-27-2

Editor

Observatorio Ciudadano

Design and layout

Lola de la Maza

Cover photo

Isabel Burr, archivo Sacrofilm

Impresión

Impresos AlfaBeta

Santiago, Chile



OBSERVATORIO CIUDADANO

Antonio Varas 428 - Temuco, Chile
Tel: 56 (45) 213963 - Fax 56 (45) 218353
E-mail: contacto@observatorio.cl - Web: www.observatorio.cl



INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS

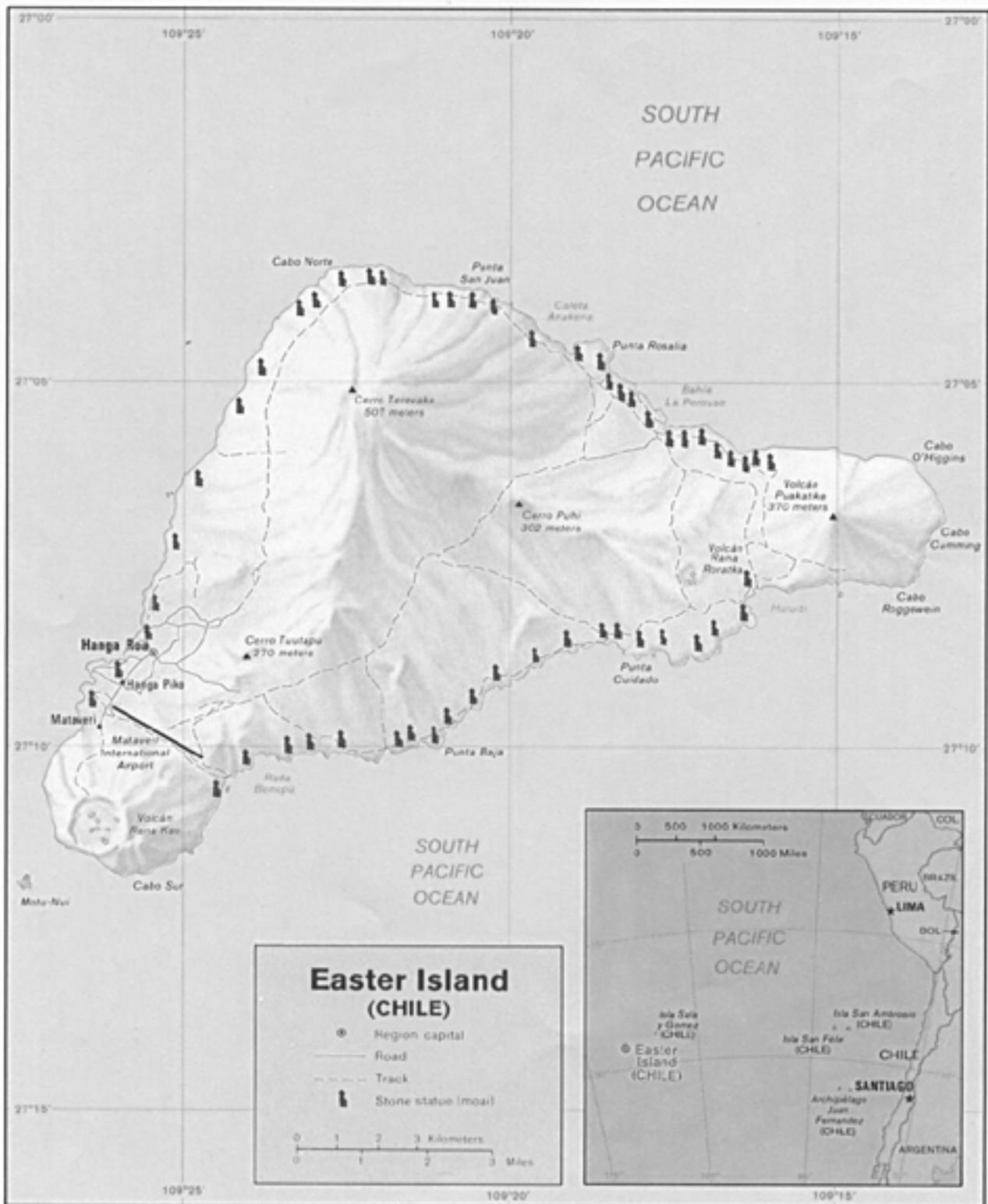
Classensgade 11 E, DK 2100 - Copenhagen, Denmark
Tel: (45) 35 27 05 00 - Fax (45) 35 27 05 07
E-mail: iwgia@iwgia.org - Web: www.iwgia.org

ACKNOWLEDGMENTS

The authors want to acknowledge the contribution of the Observatorio Ciudadano, in particular of Consuelo Labra, of the Indian Law Resource Center, as well as of International Work Group for Indigenous Affairs (IWGIA) in the preparation of this observation report. We also express our gratitude to all the individuals and institutions, particularly those of the Rapa Nui people, who provided support and information for the preparation of this report.

CONTENTS

PRESENTACIÓN	5
1. Historical information about the relationship between the Rapa Nui people and the Chilean State	7
2. Diagnosis of the Human Rights situation of the Rapa Nui and their demands, with special reference to the rights of self-determination and territorial rights	11
2.1. Self Determination	12
2.1.1 Right to Consultation over Migration Control	18
2.1.2 Conclusion	20
2.2. Territorial Rights	21
2.2.1. Lands Occupations	21
2.2.2. Return of Lands	26
3. RIGHTS OF INDIGENOUS PEOPLES IN CHILE	30
4. CONCLUSIONS	31
5. RECOMMENDATIONS	32
ANNEX	
Violations of the rights of the Rapa Nui People and Rapa Nui individuals, according to the American Convention on Human Rights	35
INTERVIEWS	38
OTHER ACTIVITIES	38



800488 (A)5824) 7 86

Map of Easter Island. {{PD-PCL|http://www.lib.utexas.edu/maps/islands_oceans_poles/easterisland.jpg}}

This document corresponds to the Report prepared by a group of observers from different latitudes and disciplines, including Clem Chartier, President of the Métis National Council, Canada; Alberto Chirif, Anthropologist and Researcher, IWGIA, Peru; and Nin Tomas, Associate Professor of Law and Researcher in the area of Indigenous Peoples' Rights at the University of Auckland in Aotearoa-New Zealand. For its preparation, the observers visited Easter Island and Santiago, the capital of Chile, in the month of August 2011, where they held meetings with traditional authorities and Rapa Nui organizations, Chilean authorities, Mapuche indigenous organizations and human rights entities.

The purpose of this Report, which has as background the recent events concerning the acts of police violence and criminalization of the territorial claims of the Rapa Nui peoples which occurred in the years 2010 and 2011, is to assess the human rights situation of the Rapa Nui people.

In the first part of the Report, historical information is provided regarding the relationship between the Rapa Nui people and the Chilean State, beginning with the annexation of the Easter Island territory to Chile in the late nineteenth century by signing a Treaty or "Agreement of Wills" in the year 1888 with Rapa Nui authorities of the time. This agreement established the basis of this relationship, becoming an essential tool for determining land rights and self-determination of the Rapa Nui people.

The thesis of the authors is that this agreement is part of a Polynesian tradition of making "international treaties" between peoples in their travels throughout the Pacific Ocean and, in this context, they accepted the Chilean government, but they did not hand over the territory and the investiture of traditional Rapa Nui authorities was maintained. This was violated by the Chilean State, which submitted the Rapa Nui to a series of afflictions, holding them in conditions of semi-slavery, as stateless and denied of all civil and political rights until 1967 when the so-called

"Ley Pascua" was enacted, as well as the violation of territorial rights and of self-determination that continue to date.

One of the most serious violations to the rights of the Rapa Nui, which remains to date, is the usurpation of their territory. This was done by means of the registration of the entire Easter Island in the name of the State of Chile, carried out in 1933, a time when the Rapa Nui were considered stateless and lacked all civil and political rights. This registration was conducted in the Valparaiso Recorder of Deeds, a city located on the continent more than 4,000 kilometers from the island, excluding any possibility for opposition, using as an argument that the land had no owners.

Since the enactment of the "Ley Pascua", this relationship changed, recognizing the Rapa Nui's rights of citizenship and other benefits, which was reinforced by subsequent legislation such as the "Indigenous Act" in the early 90's that granted special rights to the Rapa Nui and the ratification of the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries. In practice, however, as explained in this Report, such legislation has not resulted in the return of the land and respect for territorial rights and self-determination of the Rapa Nui peoples.

In the second part of the Report, an updated analysis of the human rights situation of the Rapa Nui people and their demands is made, with particular regard to land rights and self-determination. The background information is presented in more depth with respect to their collective demand to recover their ancestral territory, to respect their right to self-determination under International Law, and for the full recognition of the 1888 Treaty or "Agreement of Wills". The commitments made and not met by the Chilean State to respond to the demands of the Rapa Nui people are also examined. It especially examines the demand for effective political participation and control over their political institutions by way

of establishing a "Special Statute," a method of Immigration Control, and a special reference to efforts to achieve compliance with the right of indigenous peoples to prior consultation.

The Report also analyzes the information about the Rapa Nui people's collective demand to obtain restitution of the territory from which they have been deprived, giving rise to the peaceful occupation of public and private buildings of the island by members of the Rapa Nui people between August 2010 and February 2011. This was used as leverage to demand recognition of their rights to ancestral property, an occupation that was brutally suppressed by the Chilean state, thereby criminalizing social protest in the claim for legitimate rights.

The third section of the Report refers to the overall situation of the Rights of Indigenous Peoples in Chile. This context highlights the lack of constitutional recognition, the absence of a formal mechanism for prior consultation in case of measures which may affect them directly or to ensure their political participation, and the lack of clear measures for the implementation of the ILO Convention 169 in force in Chile since September 2009. This section also includes background information on the lack of legitimacy, indigenous representation, and inefficiency of public state agencies to reflect the social and cultural needs of peoples.

In the fourth part of the Report, it is concluded that the Chilean State maintains inequitable treatment of the Rapa Nui people, does not recognize and respect the 1888 Treaty or Agreement of Wills, thereby breaching internationally recognized human rights for indigenous peoples, particularly the territorial and self-determination rights and the right to political participation. Finally, the fifth section establishes a set of recommendations to the Chilean Government oriented towards the full respect of internationally recognized human rights of the Rapa Nui people.

Finally, the Report includes an annex with a discussion about the principal rights of the American Convention on Human Rights which have been violated by the State of Chile in the case of the Rapa Nui people and its members.

The Report introduced here, constitutes a fundamental document for the knowledge

and dissemination of the critical human rights situation of the Rapa Nui people, which must be urgently addressed by the Chilean State based on the international commitments it has assumed in this regard.

IWGIA

OBSERVATORIO CIUDADANO

1. HISTORICAL INFORMATION ABOUT THE RELATIONSHIP BETWEEN THE RAPA NUI PEOPLE AND THE CHILEAN STATE

The annexation of Easter Island by the Chilean State was effected by an "Agreement of Wills"; on September 9, 1888, a Treaty signed by the navy captain, Policarpo Toro, in representation of the Chilean State and the Rapa Nui king, Atamu Tekena. This document, which was written in Castilian and Rapa Nui/ancient Tahitian, established a relationship between the Chilean State and the Rapa Nui. There are differences between the texts. The Castilian text refers to an absolute transfer of sovereignty by the Rapa Nui to Chile. The Rapa Nui/ ancient Tahitian text, however, speaks of "what is above is written (agreed upon)", indicating that the agreement only refers to use of the surface without transferring title of the land to Chile.¹ Rapa Nui claim that their right of ownership over the entire territory of Rapa Nui was recognized as well as the investiture of its chiefs, with the Chilean Government offering to be "a friend of the island".

Oral traditions transmitted from generation to generation on the Island record that *"Atamu Tekena, the ariki (king), pulled up a bunch of grass with earth in his hand; he separated the grass from the dirt and passed the grass to Policarpo and kept the earth"*.² This gesture is in accordance with Rapa Nui custom indicating that they kept *"their ownership rights of the land in an inalienable manner"*.³ In 1840, a similar gesture was carried out by the Maori chief, Panakareao, after signing the Waitangi Treaty in Aotearoa, to indicate that *"tino rangatiratanga"* or absolute chieftainship

over lands and territory was retained by the Maori chiefs under the Treaty.

In spite of being separated by an ocean, the similarity of these recorded customs, suggests a common practice may have existed amongst Pacific peoples of demarcating the retention of land and authority in the collective hands of the *"tangata henua"* (people of the earth), while assigning a lesser authority to foreigners as newcomers. During the Mission, Professor Tomas attended a meeting with members of Te Moana Nui a Kiva, a Pan-Pacific association of indigenous chiefs living within the Polynesian triangle created by Hawaii, Rapa Nui, and Aotearoa. They stated that the process of creating Treaties is not a monopoly of western nations, but was an ancestral tradition frequently engaged in when their ancestors travelled between the Pacific Islands.

Since the annexation of the Island as Chilean territory, the State of Chile has not recognized Rapa Nui authority. Instead it granted the administration of the Island to private individuals and the Chilean Navy. The Report of the National Commission on Historical Truth and Reconciliation states: *"[T]his agreement established the transfer of sovereignty of the Island in favor of the Chilean State, who made the commitment to provide education and development to the Islanders who held their ownership rights over the land, and the Rapa Nui chiefs kept their positions of authority. However, the successive governments failed in their part of this agreement, leasing the entire island to third parties as a sheep farm and registering the ownership of all the land in the name of the Chilean Treasury"*.⁴

1 National Commission on Historical Truth and Reconciliation Report, chapter on Rapa Nui people, Page 277. Available at: [<http://www.memoriachilena.cl/upload/mi973056855-2.pdf>]

2 PEREYRA-UHRLE, Maria, *"Easter Island Land Law"*, in 12 RJP/NZAACL YEARBOOK 11, p. 135.

3 PEREYRA-UHRLE, *op. cit.*

4 National Commission on Historical Truth and Reconciliation Report, *op. cit.*, p. 276.



Moais in the Rapa Nui National Park, material and cultural heritage of the Rapa Nui people, administered by Corporación Nacional Forestal (CONAF). Photo by Gonzalo Gabarró.

In 1895 the entire island was leased to a Frenchman, Enrique Merlet, and in 1902 to Williamson Balfour, a British company whose subsidiary was the *“Compañía Explotadora de Isla de Pascua”*. From 1917 onwards the Island was subject to the authority, laws, and regulations of the Chilean Navy, which became the only State institution that would stay connected with it and its inhabitants for many years. The National Commission on Historical Truth and Reconciliation records that: *“[D]uring those years, Rapa Nui was governed by the colonizing agents linked to the sheep raising company that economically exploited the Island and by the Chilean Navy, which, for a long time, represented the interests of the Chilean Government. Political control of the sheep farm was exercised by the administration on duty, who at the same time was the Maritime Sub-delegate, standing out for the abuses and mistreatment they committed against the islanders. This resulted in the forced reclusion of the Rapa Nui population to the Hanga Roa zone with no more than 1000 hectares, an area which is fenced off with stonewalls and barbed wire to impede the islanders from moving freely throughout the island countryside. This practice*

*continued until the 1960’s and, in fact, was not modified by the naval authorities.”*⁵

In direct contravention of the 1888 “Agreement of Wills”, on November 11, 1933, the State of Chile registered the ownership of Rapa Nui lands in the name of the Chilean Treasury. Authority for the registration was drawn from Article 590 of the Civil Code, which states that *“All lands which, situated within territorial boundaries, lack another owner are considered State assets”*. The registration was published in a newspaper in the city of Valparaíso. The Rapa Nui were not informed of the registration and could not voice any opposition. Opposition would have been futile anyway because at that time Rapa Nui were not considered to be citizens or nationals of Chile. The registration of ownership was repeated 44 years later in 1967, in the Easter Island Registry of Deeds.

Despite this registration, the books of the Chilean Navy in charge of administering Easter Island since 1917, and the National Property Records, both record transfers of real property

⁵ National Commission on Historical Truth and Reconciliation Report, *op. cit.*, p. 277.

by the Treasury to, and amongst, members of the Rapa Nui. The practice is recorded since 1918 and continues after registration in the name of the Chilean Treasury. It is evidence that the Chilean State did recognize, in a minimalist way, ancestral ownership of the Rapa Nui to their lands.

The civil and political rights of the Rapa Nui were not recognized until 1966. "[T]he Rapa Nui people were not subject to law. In fact they did not have Chilean nationality and were stateless, a legal status which not only prohibited them from travelling to the continent, except on rare exceptions, but they also could not leave the country since they were not entitled to obtain a passport".⁶

Years of resistance by the Rapa Nui, together with mounting pressure from various political actors and from within Chilean civil society, and particularly the 1964 rebellion led by Alfonso Rapu, finally led to the enactment of Law N° 16,441 of 1966 ["Ley Pascua"]. Ley Pascua created a Department in the Easter Island Province and set regulations for the organization and operation of public services on the Island. Rapa Nui rights to citizenship were recognized from that time, together with tax exemptions, land rights, and a process for regularizing land titles and prohibiting land sales to non-Rapa Nui.

In 1979, during the military dictatorship of General Pinochet, Law D.L. 2,885 was enacted to regularize land ownership by granting free property titles to regular landholders. This transfer of land from the Treasury to regular landholders⁷ was limited to the Hanga Roa lands on which the Rapa Nui had been relocated after Chile annexed the Island in 1883.

In 1993 democracy was restored in Chile and Law N° 19,253 of 1993, "for Protection, promotion, and development of Indigenous peoples" ["the Indigenous Law"], was enacted. It is still in force. Article 1 recognizes the Rapa Nui as an

⁶ National Commission on Historical Truth and Reconciliation Report, *op. cit.*, p. 277.

⁷ That which comes from fair title and was acquired in good faith

"ethnic group". It enshrines Rapa Nui rights as an indigenous ethnic group⁸ and imposes a State duty to promote those rights. The Indigenous Law also establishes special regulations for the Rapa Nui ethnic group from Article 66 onwards. In particular, Article 67 creates the Easter Island Development Commission ["CODEIPA"], and outlines its function and role in regularizing Island lands. The Indigenous Law refers to the provisions in D.L. 2,885 and adopts the same procedural formula and restrictions, but it replaces the old Settlement Commission with a new administrative body, CODEIPA.⁹

Under CODEIPA, transfers to Rapa Nui have primarily been of small pieces of land granted to individual property owners. The only large transfer of land to Rapa Nui was directed to new families without land, between the years 1998-2000. Under the "*Management, administration*

⁸ Law N° 19,253 uses the term "ethnic groups."

⁹ Article 67.-

The Easter Island Development Commission is hereby constituted having the following attributions:

1.- To propose to the President of the Republic the destinations contemplated in articles 3 and 4 of the Decree Law N° 2,885, 1979;

2.- To comply with the functions and attributions that Decree Law N° 2,885, of 1979, provides to the Settlement Commission. In the compliance with these functions and attributions, it must consider the requirements established in Title I of the aforementioned Decree Law and, in addition, the following criteria:

a) To analyze the need for land of the Rapa Nui or Easter Island population.

b) To evaluate the contribution that said lands make to the development of Easter Island and to the Rapa Nui or Easter Island community.

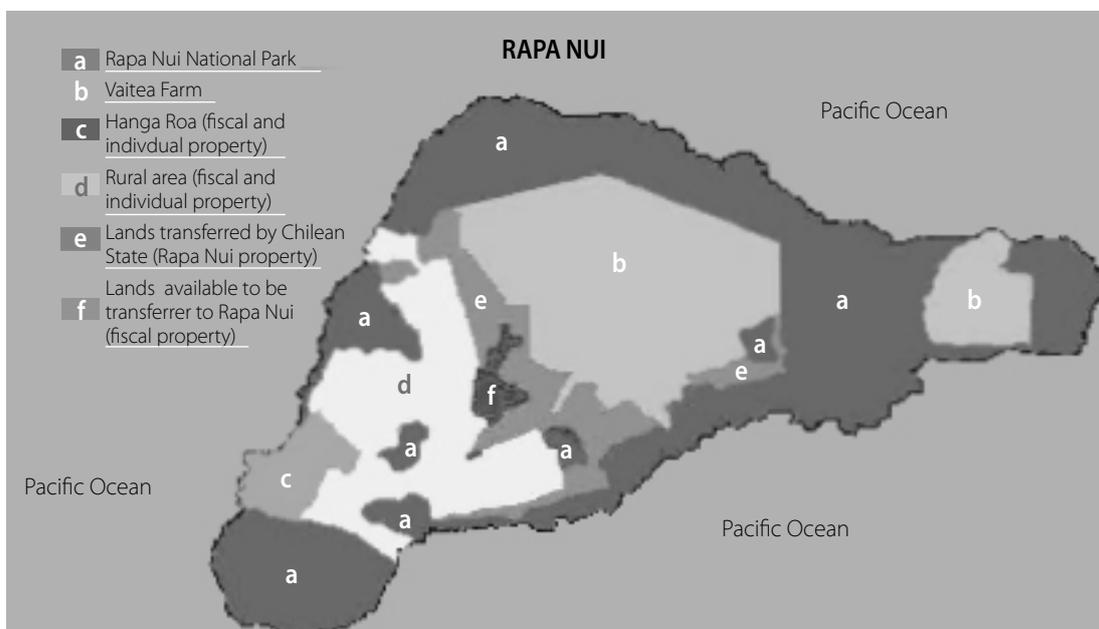
c) To foment the cultural and archeological wealth of Easter Island;

3.- To formulate and execute development programs, projects, and plans tending to elevate the standard of living of the Rapa Nui or Easter Island community, conserve its culture, preserve and improve the environment and the natural resources existing on Easter Island;

4.- To collaborate with the National Forestry Corporation (CONAF) in the administration of the Easter Island National Park;

5.- To collaborate in the conservation and restoration of the archeological patrimony and of the Rapa Nui or Easter Island culture, together with Universities and the National Monuments Council, and

6.- to prepare covenants with persons and national and foreign institutions for the compliance with the aforementioned objectives.



Map produced by Rubén Sánchez, Observatorio Ciudadano, based on information of the Ministerio de Bienes Nacionales Chile

and provision of fiscal property on Easter Island” program, 1,500 ha (254 ha of National Park, 755 ha of the Vaitea Farm and 500 ha of Fiscal property)¹⁰ was transferred. However, only the first stage of this program has been completed, and only 13% of Island land is currently under Rapa Nui control, while more than 70% remains government property¹¹. Government property is held in two entities. The first is the Vaitea Farm, which is administered by the private Company, *Sociedad Agrícola y Servicios Isla de Pascua Limitada* [“SASIPA”], whose main objective is the administration and exploitation of agricultural and urban property, public utilities services and other assets, such as the electricity and drinking water services, located on Rapa Nui. The second is the Rapa Nui National Park, which is managed

by the *National Forestry Corporation* [“CONAF”], a private corporation whose main purpose is to foster the conservation, growth management, and utilization of forest resources and protected areas in the country.

The *National Indigenous Development Corporation* [“CONADI”] is a public service body created under the Indigenous Law. Its functions include the restoration of ancestral lands that have been taken away from indigenous peoples. It has been interpreted by CONADI that it does not have legal mandate for regularizing the land as this authority belongs to CODEIPA and to the Ministry of National Asset. As a result, the Land and Water Fund established under Article 20¹² of the Indigenous Law has been executed restrictively on the Island for irrigation infrastructure only.

10 See: “*Los Derechos de los Pueblos Indígenas en Chile*”, Indigenous Rights Program Report, Institute of Indigenous Studies, Universidad de la Frontera, Lom editions, 2003. Chapter V, “*Los derechos del pueblo Rapa Nui*”

11 See: RIVAS, Antonia, “*The Power of the Law. Land Rights on Rapa Nui*”, p. 18-19, Paper delivered to the Law and Society Association conference. San Francisco, June 2011.

12 The Fund for Indigenous Lands and Water is a mechanism created by the Indigenous Law to subsidize the expansion of indigenous lands, through purchasing land from private owners which are claimed by indigenous peoples and constitute or regularize the water rights to indigenous peoples.

2. DIAGNOSIS OF THE HUMAN RIGHTS SITUATION OF THE RAPA NUI AND THEIR DEMANDS, WITH SPECIAL REFERENCE TO THE RIGHTS OF SELF-DETERMINATION AND TERRITORIAL RIGHTS.

Conversations with Rapa Nui government authorities and the general public established a widely-held view that the entire Rapa Nui territory is claimed as ancestral territory held collectively by the different clans under their customs and laws.

Today approximately 3,000 Rapa Nui live on the Island.¹³ Those we interviewed said that their current land and territorial claims under “self-determination” and “land rights” are based on original occupation and ancestral rights to the land that existed prior to the 1888 Treaty. Some questioned its validity, noting that the current exercise of government over the island by the Chilean State does not recognize this perspective, but relies instead upon the Spanish language version of the 1888 Treaty, under which Chile claims to have acquired “sovereignty” over the territory and inhabitants of Rapa Nui under outmoded colonial concepts of international law that have long been discredited.

There is growing concern amongst the Rapa Nui that the State of Chile does not recognize or promote “self-determination” according to the precepts of modern International Law, but continues instead to rule Rapa Nui without recognizing either the autonomy or self-government and territorial rights of the Rapa Nui people.

Discontent amongst the Rapa Nui has its legal origin in the non-ratification of the Agreement of Wills Treaty by the Chilean Government and

non-compliance with its terms. As previously mentioned, the entire island was registered as the property of the State of Chile in 1933, without respecting the 1888 Treaty, the Rapa Nui people, or their kinship and ruling systems.

In this regard, Chilean government authorities spoke about recent efforts made to provide for representation of Rapa Nui in government, to consult with indigenous peoples in Chile (including the Rapa Nui), and to resolve land rights and provide access to public services on the island. The effectiveness of these government measures was questioned by the Rapa Nui and Mapuche representatives with whom we met in Santiago.

In general, such measures were viewed as unsystematic and piecemeal steps taken to resolve problems posed by migration, the poor political relationship that exists between Rapa Nui and the Chilean Government, and individual land claims. No-one we interviewed saw them as a genuine effort toward implementing the 1888 Treaty. A widely-held view was that true recognition must include forms of Rapa Nui self-government and autonomy.

An elder of the Rapa Nui Parliament told us that the right to prior consultation and consent that is stipulated in ILO Convention 169 of the ILO makes sense to them, but that State actions have not been consistent with this. In his opinion, the Government has not consulted them about the activities that it develops on the island. The Rapa Nui Parliament wanted to know the laws and rights that they can make use of to protect their natural resources, including their ocean fisheries.

Likewise, Parliament members also cited historical conflicts and disputes with the

¹³ The latest official statistic corresponds to the Population Census carried out in 2002, a time in which the Island had 3,798 inhabitants, of whom 2,269 were Rapa Nui. www.inec.cl

Chilean State over land. They want the State to recognize that the land belongs to the Rapa Nui people and to initiate a process for regaining the effective control of island lands to them.

2.1. Self Determination

Self-determination is a principle of International Law that has been transformed and reshaped over the years, from an aspirational principle for States that is enshrined in the United Nations Charter of 1945, to an enforceable right of colonized peoples at the time of decolonization from 1945 to the 1960's, to a recognized right of peoples living within States under the Civil and Political Rights and Economic and Social Rights Covenants of the United Nations by the late 1960's, and, finally, as a right of indigenous peoples that must be respected by the States under the 2007 UN Declaration on the Rights of Indigenous Peoples.¹⁴

This principle of International Human Rights Law is based on Article 73 of the United Nations Charter¹⁵ which states: *"The Members of the United Nations which have or assume the responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the wellbeing of the inhabitants of these territories"*, and, to this end, they are committed to comply with certain obligations, amongst which, the first two are especially relevant to the case of the Rapa Nui:

14 See: TOMAS, Nin, *"Indigenous Peoples and the Maori. The Right to Self-Determination in International Law-From Woe to Go"*, in *New Zealand Law Review*, 2008, p. 648.

15 Alberto Chirif is grateful for the information and reflections that were provided on this matter by Pedro García Hierro.

- a. *"to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*
- b. *"to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement"*.

In practice, the right could only be exercised by peoples inhabiting overseas colonial territories, and it thus avoided the problems of internal colonialism and indigenous peoples. The theory, referred to as the "the blue water thesis" has its legal foundation in Principles IV and V of the Resolution 1541 of United Nations.¹⁶

Although the Rapa Nui case was not considered for the Decolonization Program by the United Nations, it meets all of the requirements of the "sea in between" theory, a situation further enhanced by the fact that it involves an indigenous people.

The recognition of this principle of International Law as an enforceable right of indigenous peoples is possible because the principle has evolved to the point where it now has the status of a collective Human Right. In this way, as indicated by Anaya, *"self-determination is properly interpreted as arising from the framework*

16 Principle IV: *Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V: Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

of human rights of contemporary international law more than from the framework of the rights of the States".¹⁷

Indigenous peoples were historically, deliberately excluded from the right to self-determination, despite its recognition as a collective human right in the United Nations Covenants that ensure this right to all "peoples".¹⁸

Common Article 1 of the Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights states:

"Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States, parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations".

After years of claiming this right in international organizations, indigenous peoples finally gained recognition in the 2007 United Nations Declaration on Rights of Indigenous Peoples. Special measures are established in the Declaration to ensure indigenous autonomy and

17 ANAYA, James, "The right of indigenous peoples to self-determination", in *The challenge of the Declaration – History and Future of the United Nations Declaration on Indigenous Peoples*, editors Claire Chambers and Rodolfo Stavenhagen, IWGIA, 2009.

18 See TOMAS *op. cit.* and ANAYA, *op. cit.*

self-government in internal and local affairs¹⁹, as well as the right to determine and develop priorities under the right to development.²⁰

In this way, indigenous peoples have the right to maintain and develop their political, economic, and social systems and institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. The right of Indigenous Peoples to determine and develop all health, housing, and other economic and social programs that affect them, and, wherever possible, to administrate these programs through their own institutions, is specifically recognized.²¹

It is important to note that ILO Convention 169 has been in force in Chile since September 2009. Because States feared that self-determination under the United Nations Covenants might support secession, Article 1.3 of the Convention states that the term "peoples" "shall not be construed as having any implications as regards the rights which may attach to the term under international law". This limitation does not exclude indigenous peoples from the human right of self-determination.

In this regard, the ILO itself declared that ruling on the self-determination of indigenous peoples was outside the scope of its competence.²²

Even though the ILO Convention and the Declaration bear a different legal status, the Declaration is considered to be binding by

19 "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." (Article 4)

20 "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development." (Article 23)

21 Articles 20 and 21, United Nations Declaration on the Rights of Indigenous Peoples.

22 International Labor Conference; *Partial revision of the Covenant on Indigenous and Tribal populations, 1957 (N° 107) Report IV (2°)*, International Labor Office, Geneva, 1989.

indigenous peoples, upon the States that willingly signed it after 25 years negotiating its terms. Articles 38 and 42 of the Declaration set out the duties of compliance and promotion required of States:

“Article 38: States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

“Article 42: The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

Furthermore, States must view it as an instrument that enlightens public policy and guides the interpretation of legislation. In Chile, this includes ILO Convention 169. The instruments should not be read as conflicting; on the contrary, they are to be viewed as containing complementary norms that must be interpreted harmoniously.

The Declaration raises the profile of ILO Convention 169. Article 35 of the Declaration states that “[T]he application of the provisions of this Convention **shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, customs, or agreements**”.²³ CLAVERO argues that, “...the Convention can be a very valuable tool for the actual reception of the UNDRIP in the case of States that are party to it, or which will take part in it the future.”²⁴

Although the Convention does not expressly recognize indigenous peoples’ right to self-

²³ The highlighting is ours.

²⁴ CLAVERO, Bartolomé, *Cometido del Foro Permanente para las Cuestiones Indígenas a la Luz del Valor Vinculante y con Vistas a la Mayor Eficacia del Derecho Internacional de los Derechos Humanos*, United Nations, PFII/2009/EGM1/4.

determination, it supports human rights by acknowledging that indigenous peoples have the right to decide their own development priorities affecting their lives, beliefs, institutions, and spiritual well-being, the lands they occupy and use, and to control their own economic, social and cultural development.

The ILO has strongly argued that its provisions do not support creating a State within a State but are oriented toward actions “in the framework of the State in which they (the indigenous and tribal peoples) live”.²⁵

In line with the above, the Convention urges governments to promote indigenous self-development. It suggests that States, upon the request of the peoples concerned, provide appropriate technical and financial assistance wherever possible, for the management of their own funds, taking into account the traditional technologies and cultural characteristics of the peoples, as well as the importance of sustainable and equitable development.²⁶

The right to self-determination for indigenous peoples has been reinforced by the jurisprudence of the United Nations Human Rights Committee in two cases decided under Articles 1 and 27 of the Covenant on Civil and Political Rights, in 1984 and 1994.

The Committee stated in its General Observation N° 12, of 1984, under Article 1 of the Covenant on Civil and Political Rights, which contains the right to self-determination of peoples, that:

“6. Paragraph 3, in the Committee’s opinion, has special importance in that it proposes specific obligations to the States parties to the covenant, not only in relation to their own peoples but with all peoples who have not been able to exercise their right to self-determination or who have been deprived of the possibility of exercising said right. The general character of this paragraph is confirmed by the information

²⁵ ILO Guide, p. 20 and 21.

²⁶ Article 23.2 of the ILO Convention 169.

relating to its writing. Said paragraph stipulates that: "The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". These obligations exist irrespective of whether a people entitled to self-determination depends, or not, on a State party to the Covenant. It follows that all States parties should adopt positive measures to facilitate the exercise and the respect of the rights of peoples to self-determination.

These positive measures should be compatible with the obligations contracted by the States pursuant to the United Nations Charter and international law; particularly the States must refrain from interfering in the internal affairs of other States, thereby unfavorably affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures adopted to that effect".^{27,28}

In addition to ensuring the autonomy and self-government of indigenous peoples in their internal and local affairs, and in accordance with their own political institutions and cultural models, the right to self-determination also has a participative aspect²⁹ that requires that indigenous peoples be able to participate fully "[i]n the political, economic, social and cultural life of the State",³⁰ and in all decisions affecting them.³¹

27 General Observation No. 12, General comments made by the Human Rights Committee Article 1 – Right to Self-determination, 21st period of meetings, U.N. Doc. HRI/GEN/1/Rev.7 at 152 (1984).

28 The highlighting is ours.

29 ANAYA, *op cit*.

30 Article 5, United Nations Declaration on the Rights of Indigenous Peoples.

31 Article 18, United Nations Declaration on the Rights of Indigenous Peoples.

The right of consultation of indigenous peoples is clearly established in Article 19 of the Declaration: "[T]he States shall 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".

The right of participation has been widely recognized by international human rights law. Instruments such as ILO Convention 169 provide recognition in Articles 6 and 7. However, it is also viewed as an extension of the human right to political participation in courts such as the Inter-American Court of Human Rights ["IACHR"]. The IACHR has stated that: "[T]he right to consultation, and the corresponding state duty, are linked to several human rights, and in particular they connect to the right of participation established in Article 23 of the American Convention, as interpreted by the Inter-American Court in the case of YATAMA vs. Nicaragua. Article 23 recognizes the right of '[e]very citizen' to 'take part in the conduct of public affairs, directly or through freely chosen representatives'. In the context of indigenous peoples, the right to political participation includes the right to 'participate in decision-making on matters and policies that affect or could affect their rights from within their own institutions and according to their values, practices, customs, and forms of organization".³²

Taking account of the above, and given that Chile has signed the United Nations Covenant

32 Inter-American Commission on Human Rights, Report: "Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources", December 2009, p. 109, parag.274.

on Human Rights³³, ILO Convention 169³⁴, and the United Nations Declaration on Rights of Indigenous Peoples³⁵, we conclude that the State has not complied with the right of self-determination as it applies to the Rapa Nui.

In conversations with the Rapa Nui we discerned that most Rapa Nui want Chile to continue its relationship with the island. They are not seeking secession, but want their relationship with the Chilean State to be re-framed under laws and institutions that reflect greater respect for the Rapa Nui and which adhere to modern international law guidelines, including the Declaration on the Rights of Indigenous Peoples.

33 Ratified and in force since 1976. It is worth noting that the Human Rights Committee, in the Observations made to the State of Chile in its Fifth Periodic Report, CCPR/C/CHL/CO/5, 89th period of sessions, April 17, 2007, made a recommendation regarding Indigenous peoples (especially Mapuche people), based on Articles 1 and 27 of the CCPR, establishing the following in paragraph 19 of said Report:

"While noting the intention expressed by the State party to give constitutional recognition to indigenous peoples, the Committee is concerned about the variety of reports consistently received in the sense that some of the claims of indigenous peoples, especially the Mapuche people, have not been met, and the slow pace of demarcation of indigenous lands has caused social tensions. The Committee is sorry to learn that "ancestral lands" are still threatened by forestry expansion and energy infrastructure megaprojects. (Articles 1 and 27)

The State party should:

a) Make every effort to ensure that its negotiations with indigenous communities indeed lead to a solution that respects the land rights of these communities in accordance with Articles 1 (paragraph 2) and 27 of the Covenant. The State party should expedite procedures to recognize such ancestral lands.

b) Modify Law 18,314, adjusting it to Article 27 of the Covenant and reviewing sectorial legislation that may be in conflict with the rights enshrined in the Covenant.

c) Consult with indigenous communities before granting permits for economic exploitation of disputed lands and ensure that the exploitation in question does not violate the rights recognized in the Covenant."

34 Ratified and in force since 2009.

35 Signed by Chile with a favorable vote to its adoption at the General Assembly of the United Nations in September 2007, without reservations.

We have witnessed the unsuccessful attempts of the Rapa Nui people to gain recognition of their right to self-government, through their own institutions and according to development priorities defined by them, under the "Special Statute" passed by the Chilean government for Rapa Nui. Commitments made by the Chilean government under this statute have only been partially implemented, requests for migration control are now urgent, and Consultation processes need to be reviewed.

In July 2007, law reform introduced a new norm into Chapter XIV of the Chilean Constitution on Government and Internal Administration of the State. It provided:

*"Article 126 bis. - The Special territories correspond to **Easter Island** and to the Juan Fernández Archipelago. The Government and Administration of these territories shall be governed by the **special statutes established by the respective constitutional organic laws**".³⁶*

Constitutional reform is necessary because the current State administration does not meet the demands and needs of the Rapa Nui.

The Republic of Chile is divided into territorial "Regions" that are administered by "Regional Governments". They are comprised of the "Intendant", who is directly appointed by the President of the Republic, and the Regional Council. The Council is presided over by the Intendant. Council members are appointed by municipal councilors, authorities of the local municipal governments who are publicly elected.

The Regions are constituted by smaller territorial units called "Provinces". Each Province is administered by a Governor chosen by the President. The Governor operates under the authority of the Regional Intendant. He supervises existing public services within the

36 The highlighting is ours.

Province, according to instructions given by the Intendant.³⁷

Rapa Nui belongs to the territorial Region of Valparaíso. Its Regional Government and Intendant reside in the regional capital city of Valparaíso which is 4,000 km from Rapa Nui. At the same time, Rapa Nui also constitutes the Province of Easter Island and the Municipality of Easter Island, whose respective authorities are the Provincial Governor, under the central administration; the Mayor, and the Municipal Council, these last being elected by popular vote.

In addition, CODEIPA is a legal body created by Law 19,253 of 1993, for the fulfillment of specific functions set out in Article 67. It has 15 members and is chaired by the Governor. There is no guarantee of a Rapa Nui majority in CODEIPA as only 6 of its 15 members are directly elected by the Rapa Nui.³⁸

The overlapping authorities set out above, the constant demand from the Rapa Nui for effective political participation and control over their political institutions, and the geographical isolation and archeological and natural heritage of the Island, have together led to approval for constitutional reform to establish a "Special Statute" for Rapa Nui.

³⁷ Article 4, of Law N° 19,175, Constitutional Organic Law on Government and Regional Administration.

³⁸ "Article 68. - *The Development Committee of Easter Island will consist of one representative from the Ministries of Planning and Cooperation, Education, National Assets and National Defense; a representative of the Production Development Corporation (CORFO), one of the National Forestry Corporation (CONAF), and one from the National Indigenous Development Corporation (CONADI); the Governor of Easter Island; the Mayor of Easter Island, and six members of the Rapa Nui or Easter Island community elected pursuant to regulations issued for this purpose, one of the whom shall be the President of the Council of Elders. The Governor shall chair this Committee and the Head of the Bureau of Indian Affairs of Easter Island will act as Technical Secretary.*"

A Presidential Message announcing the constitutional reform process was submitted to Congress in 2005. It stated that:

"[T]he Rapa Nui territory management is particularly complex due to, among other factors, its natural and archeological heritage, unique to this planet, to its geographical isolation as an island, and by being mostly inhabited by members of an ethnic community that seeks greater opportunities for participation.

The administration of the territory is structured by a series of political tensions in a broad sense of the term (between Rapa Nui authorities and heads of services, Rapa Nui leaders and national authorities) and, certainly, by the plurality of laws that affect the management of the island".³⁹

In compliance with the constitutional reform that introduced Article 126 bis, a Bill was submitted to the Congress of Chile in July 2008, by Presidential Message, on the *Special Statute of Government and Administration for the Easter Island Territory*. The Bill has been stalled, without discussion, in the first constitutional stage in the House of Representatives, since December 2010 (Legislative Bulletin N° 5940-06).⁴⁰

The Bill refers to the special situation of Easter Island due to its territorial isolation. It does not recognize rights to self-government of the Rapa Nui and it guarantees them little participation in the public positions and bodies that are created for the administration of the territory.

In short, the Bill re-organizes the authorities that are already administering the Island, using a model similar to the rest of the territory. It turns Rapa Nui into a territorial unit similar to a "Region",

³⁹ History of the Law N° 20,193 Constitutional reform project that establishes the special territories of Easter Island and the Juan Fernández Archipelago, National Congress Library, July 30, 2007. Available at: [<http://www.leychile.cl/Navegar?idNorma=263040>]

⁴⁰ Legislative Bulletin N°5940-06. Available at: http://www.camara.cl/pley/pley_detalle.aspx?prmID=6325&prmBL=5940-06

which will be administratively dependant on the central government. It does not create more opportunities for the Rapa Nui to participate in decision-making.

According to the government proposal, the highest authority in the Special Territory would be the "Island Governor", who would head an "Island Territory Government" appointed by the President. The Island Governor would exercise his/her functions according to Presidential instructions, in a role that would include presiding over the "Island Development Council" and the "Land Commission".

The Government of the Island Territory will be by a new legal body similar to the regional councils named in the "Island Development Council". The Council is described as a political body that is representative of the community. It is made up by 6 councilors who are elected directly by citizens registered in the electoral registry of the Special Territory, at least 4 of whom must be Rapa Nui; the President of the Rapa Nui Elders Council; the Rapa Nui Mayor and the Island Governor. The Governor will be the chairman and will have speaking rights only. The limitations of this body are clear: its main powers are to oversee and approve distribution of the island investment program proposed by the Island Governor.

CODEIPA would be replaced by a "Land Commission" established to regularize Rapa Nui property ownership. The Commission would comprise the Island Governor, who would preside; 5 Rapa Nui members; the President of the Elders Council; the Mayor of Easter Island; 1 representative of the Ministry of National Assets; and the Director of the CONADI office on Easter Island. However, no new powers are contemplated to reverse the shortage of lands held by the Rapa Nui, and, even more worrisome, the collaboration that CODEIPA grants to CONAF in the administration of the National Park would come to an end. This would end what little participation Rapa Nui currently have in the administration of this protected area, which is the primary patrimony of the Rapa Nui.

Inconsistency in the contents of the Bill and lack of consultation with the Rapa Nui about legislative measures that directly affect them, has produced resistance from the Rapa Nui. Although withdrawal of the Bill was agreed by the executive in December 2010, it has not yet taken place. This has resulted in a clear discontent by the Rapa Nui of the Chilean government who are seen as makers of false promises.

During our mission and particularly during the Seminar on "*The Human Rights of Indigenous Peoples and their implications for the Rapa Nui People*", held in Hanga Roa on August 1- 2, 2011, we witnessed an overwhelming rejection of the *Special Statute* Bill by the diverse organizations that represent the Rapa Nui. A high level of distrust in what the government is doing on the other side of the ocean in Chile was evident. It was apparent to us that the current government is not well viewed on the island.

2.1.1. Right to Consultation over Migration Control.

Another historical demand of the Rapa Nui is for controlled migration to Rapa Nui. Generalized noncompliance and lack of implementation by the Chilean government of the right to consultation of indigenous peoples is evident in the legislative process established for migration control to Easter Island.

After the introduction of the new Article 126 bis of the Constitution, a constitutional amendment was submitted to permit migration control in the territories of the Juan Fernández archipelago and Rapa Nui.⁴¹

The Rapa Nui demand for migration control is based on concern to preserve their culture and territory, a fragile ecosystem that will suffer irreversible environmental damage if the island's demographic carrying capacity is not regulated.

⁴¹ Submitted to Congress by means of Presidential Message N°1487-357, dated October 28, 2009 (Legislative Bulletin N° 6756-07).

We echo this concern about the risk to the cultural integrity of the Rapa Nui posed by exceeding the population carrying capacity of Rapa Nui.

We view with concern the information and projections of the National Institute of Statistics (INE) that state that in 1992 Rapa Nui had 2,973 inhabitants, in 2002 it had 3,978 inhabitants and in 2012 its population has reached 5,167. The Rapa Nui population has increased by 86% in 20 years, a period in which the overall national population of Chile has increased by only 63%.⁴²

The cultural and environmental impacts generated on Rapa Nui as a consequence of the population growth due to external migration, is why the Rapa Nui, through their organizations, demanded the establishment of migratory control over their territory. The authority proposes modifying the Constitution of the Republic, Article 126 bis, by adding a second paragraph to authorize migratory control and restrict the free movement of people to the island territory. The executive, mindful of ILO Convention 169, carried out a consultation process in order to collect the views of the Rapa Nui prior to submitting the reform Bill to Congress.

The consultation process was criticized for not complying with international standards that require intercultural dialogue, but instead being treated as an *information gathering* exercise. Despite criticism it was validated by Rapa Nui organizations. The project was submitted to the vote of the Rapa Nui by a plebiscite held on October 24, 2009, in which more than 700 persons participated. The text was approved by over 96% of those who voted. The plebiscite contained the following: *"Do you agree for the Constitution to be amended in order to restrict the*

⁴² Report submitted by the Government Commission, Decentralization and Regionalization of the Senate, dated December 17, 2009, the Bill amending Article 126 bis of the Constitution of the Republic, on special territories of Easter Island and Juan Fernández Archipelago.

exercise of free circulation, permanence or residence, for the purpose of protecting the environment and the sustainable development of the Island?"

It should be noted that the Rapa Nui, despite their approval, questioned the content of the project because it did not expressly exclude them from migration control or protect their free circulation on their ancestral lands. In addition, concern was expressed that it did not take into consideration the right to conserve their culture and self-determination as justifying the Rapa Nui reason for controlling migration.

The Bill was submitted by Presidential Message to the Congress for its approval and passed its first constitutional step before the Senate. However, while it was in the House of Representatives, the President of the Republic, making use of his constitutional powers, without reference to other reasons or without consulting the Rapa Nui people, substantially modified the text of the Bill that was submitted to vote.⁴³ The new text reads as follows:

"Article One.- To be incorporated into Article 126 bis of the Constitution of the Republic, the following new second paragraph:

"The Rights to reside, stay and transfer to and from any place in the Republic, guaranteed in number 7° of Article 19, shall apply in said territories in the manner determined by the special laws that regulate their exercise, which must be of qualified quorum"

The Bill no longer restricts the right of freedom of movement, but simply regulates its exercise. It eliminates references to environmental protection and sustainable development on Rapa Nui that were contained in the original Bill, as recorded in the report prepared by the House of Representative's Committee on Constitution, Legislation and Justice dated November 02 of 2010. Page 1 of that Report states:

⁴³ Official Letter N° 171-359 dated September 06, 2011.

"I.- CENTRAL OR FUNDAMENTAL IDEAS.

*The central idea of the initiative is to amend Article 126 bis of the Constitution, to allow to legally establish on the island territories of Easter Island and Juan Fernández, **restrictions to the rights of permanence or residence and to the free circulation to them, for the purpose of protecting the environment and ensuring their sustainable development**".⁴⁴*

The amendment, which was approved by the Congress of Chile in January 2012, seriously violates the will of the Rapa Nui people as expressed by popular vote, and the right of indigenous peoples to be consulted on legislative measures that affect them. It is our view that the right to consultation also includes any modification of essential matters agreed upon in previously consulted projects. There is an urgent need for the Chilean legislature to determine how it will fulfill its duty to consult properly with indigenous peoples.

2.1.2 Conclusion

It is our Opinion that the demand for self-determination by Rapa Nui is oriented towards exercising greater autonomy in the form of self-government, under the terms established by the UN Declaration on the Rights of Indigenous Peoples. To make this demand a reality, an internal discussion is required amongst the Rapa Nui, along with an intercultural discussion between the Rapa Nui and the State of Chile. Discussions must be carried out in the utmost good faith. We suggest that it would be beneficial to keep in mind the unique characteristics of the Rapa Nui and to look at comparable systems from other Pacific nations that share a common history with the Rapa Nui in order to forge the best way forward.

Of particular importance in this regard are the observations made by the anthropologist, Alberto Chirif, who states that when talking with

⁴⁴ The highlighting is ours.

the Rapa Nui he perceived a strong sense of identity and, in fact, that concrete manifestations of this can be found. The widespread use of the language is one of the most compelling demonstrations of their identity that a visitor can experience. At the same time, in conversations with the people it is clear that they know their own history, both ancestral with other parts of the Pacific and more recently with Chile as a colonial power.

Professor Tomas, a Maori legal researcher knowledgeable about Pacific peoples, stated that the Rapa Nui people and territory possess unique characteristics that will influence the way that self-determination is assumed. She observed that Rapa Nui cultural links and identification with Pacific peoples is stronger than with fellow Chileans. In particular, it was obvious that:

- Rapa Nui language, culture and physical appearance have strong Tahitian and Maori associations.
- The friendly and inclusive "collective" community style that governs personal interactions amongst the Rapa Nui are characteristic of Polynesian society. This differs considerably from the rugged individualism found within Western society.
- The Rapa Nui language contained many words used by the Maori of Aotearoa, New Zealand. For example: "pono" truth; "tana ingoa" his or her name; "henua" land/territory; "tangata henua" people of the earth; "mana" authority/prestige; "tapu" sacred/restricted.

Professor Tomas also observed that Rapa Nui culture is based upon a deep bond that connects the "wairua" (spirit) of the land (henua) with the spirit of the people (tangata). This is also typical of the relationship of the Maori and other Polynesian peoples with their world, and their ancestors (tupuna), and is expressed in the genealogy of their families (haka-papa).

The Maori of Aotearoa and the inhabitants of Rapa Nui share common ancestors. Professor

Tomas was greeted as a “teina” (sister) coming home by the Rapa Nui. In the evening of the second day she was received by a Rapa Nui women’s organization, Makenu Re’o Rapa Nui, with the traditional “karanga” (formal welcome through song), followed by prayer, rituals, and the blessing of food, which were familiar to her as they corresponded to common practices in the customs of the Maori in Aotearoa. As a first-time visitor, she was able to communicate in a language that was mutually understandable. “It was like being welcomed home”, she said.

Although Rapa Nui is not explicitly named in the list of territories permitted to achieve total independence by adopting the legal “blue water” thesis promoted by the United Nations in the 1950’s and 60’s, it satisfies the founding criteria of being a culturally and physically distinct nation that is separated from Chile by 4000 kilometers of ocean.

However, any aspiration to pursue full independence from Chile is mitigated by the small size of the island, the scarcity of natural resources, and its isolation. In similar situations, and by way of comparison, certain other Pacific Islands, such as Tokelau, Niue, and the Cook Islands, which had the opportunity to assume the status of fully independent territories under the scheme promoted by the United Nations, chose to enter into Free Association with Aotearoa, New Zealand instead.

We reiterate that most Rapa Nui did not seek full independence from the Chilean State, but rather desired forms of self-government that gave them greater control of their lands and affairs.

2.2. Territorial Rights

2.2.1 Lands Occupations

As indicated above, the Rapa Nui people have been deprived of a large part of their ancestral territory. Most of it is now held by the Chilean Treasury. In August 2010, members of the Rapa Nui carried out peaceful occupations of public and private buildings in Hanga Roa, as a way of

bringing pressure to bear on recognizing their ancestral property rights to the lands on which these buildings were located, and to the rest of the island which currently has the status of fiscal property of Chile.

These occupations principally included:

- a. Private property - the Hotel Hanga Roa land that was transferred by the State to private entities without the consent of the Hito Clan.
- b. Civic Center - 6 fiscal properties occupied by the Tuko Tuki Clan.
- c. Riro Kainga Plaza occupied by the Rapa Nui Parliament and clan members.

According to information gathered during the mission, the government reacted to the situation by initiating a process of dialogue with discussion groups, by sector. However, at the same time, it also criminalized the actions of protesters and increased the police presence on Rapa Nui. The increased police presence created an unprecedented climate of militarization on Rapa Nui. The issuing and carrying out of administrative and legal eviction orders in a violent and harassing manner further exacerbated the situation.

On August 06, 2010, the Minister of Internal Affairs, Rodrigo Hinzpeter, undertook to establish work committees that would address the demands of the Rapa Nui within 60 days. This included demands for land (including the occupied lands), migration problems, the Statute for Rapa Nui Autonomy and the preparation of a Development Plan for the Island.

The following work committees were created:

- “Migration”, headed by the Deputy Minister of Internal Affairs, Rodrigo Ubilla;
- “Administrative Statute”, headed by the under-secretary of Regional Development, Miguel Flores;
- “Development Plan”, headed by the Intendant of Valparaíso, Raúl Celis; and



A Carabineros de Chile contingent prepared for the eviction of the Hitorangui clan from the Hanga Roa Hotel, on February 2 of 2011. The eviction was implemented without previous judicial order two days prior to the judicial hearing where the formalization of the clan members took place. Isabel Burr, Sacrofilms files.

- "Land", headed by the Deputy Minister of National Assets, Carlos Llancaqueo (current presidential commissioner for Easter Island).

The dialogue opened up by the Chilean government through work committees to resolve the disputes was conditional on protestors leaving claimed lands. This requirement guaranteed limited Rapa Nui participation from the outset. It was also claimed that the committees lacked transparency, that no minutes were kept, and no official documents were issued by the committees. The committees were viewed with skepticism by many Rapa Nui and their organizations, to the extent that some withdrew their claims from the process. Thus, for example, the Hito Clan, who claimed lands on which the Hotel Hanga Roa is currently located, did not present its records and information to the "Land" work committee.

On October 22, 2010, after the 60 days in which the government promised to deliver the results of the work committees had elapsed, the Minister of Internal Affairs announced the "Easter

Island Development Plan". The Plan was criticized by the Rapa Nui because it involved projects and resources that had already been committed to by the previous administration, as for example resources already allocated for the Hanga Roa Hospital. It was also criticized for not complying with promises made for a migration statute by December 2010, something which has still not been agreed with the Rapa Nui.

In late December 2010 the Government provided a private summary of the work committees to members of the CODEIPA and to the authorities of Easter Island, but the information was not made publically available to the Rapa Nui. The document was described by the government as a "*diagnosis of the situation based on which Government proposals shall be made*". It does not contain solutions that have been agreed upon with the Rapa Nui to address their legitimate demands and claims.

In regard to the criminalization of protest, in October and December 2010, an extra emergency police force was mobilized. 40



Demonstration in support of the Hitorangui clan and their land claims, February 26, 2011. Isabel Burr, Sacrofilms files.

members of special police forces were sent from Chile in October and another 90 were sent in December. The number of detectives on the Island was also increased. The Attorney General appointed a Deputy Prosecutor specifically for the criminal cases arising from the land claims.

In this context, the following events were highlighted:

a. Occupation of Hotel Hanga Roa by the Hitorangui Clan

We were advised that on September 07, 2010, a warrant was issued by the Easter Island Supervisory Judge, Mr. Bernardo Toro, authorizing Police, without prior notice to the accused, to enter, register, and seize from the Hotel certain electronic equipment in risk of being damaged by the “occupiers”. Police and detectives entered the Hotel Hanga Roa and began evicting people. The occupiers included children, women, and senior citizens. We were

told that the police used unnecessary violence to arrest some occupants.

This event led to a request for precautionary measures from the Inter-American Commission on Human Rights, made through the Indian Law Resource Center, representing the majority of Rapa Nui Clans (filed under N° MC- 321-10).

On the same day, September 07, members of the Clan returned to occupy the hotel. The occupation lasted until February 06, 2011. This was 2 days before a court hearing before the Easter Island Supervisory Judge of charges against the Hitorangui and of their claim that precautionary measures relating to fundamental guarantees of civil rights do not constitute crimes. The Police allowed more than six months to elapse from the start of the occupations before asserting the crime of usurpation and using their powers under Articles 83° and 206° of the Criminal Procedure Code to carry out violent evictions at the Hotel. That they detained two women using private vehicles owned by the



Violent eviction of the Civic Center on December 3, 2010, which resulted in more than 20 Rapa Nui injured by rubber bullets shoot by Carabineros de Chile and Policia de Investigaciones. Among them was Edith Chavez Atan.

Schiess family, was later denounced by lawyers of the Hito Clan.

Prior to this, in January 2011, the Public Prosecutor's Office issued a search warrant for the Hotel Hanga Roa, based on the crime of usurpation, without legally charging the Hitorangui clan, or holding a court hearing. The warrant was not implemented.

A few days earlier a ban had been placed by Police prohibiting people entering the Hotel Hanga Roa. It is claimed that this was used to harass the Hito family, as food was only allowed into the facilities after those providing it had first been registered and photographed by Police.

The above orders led the Hito Clan to request a hearing for precautionary measures in the presence of the Supervisory Judge, in addition to the pending charges (February 08), and the filing of a complaint based on violation of Constitutional Rights to the Appeals Court of Valparaíso (which was dismissed).

Hitarangui Clan members, after being evicted on February 06, 2011, and formally charged on February 08, 2011, are still awaiting trial for the crime of usurpation. It is claimed that this delay violates their right to due legal process.

b. Civic Center

On December 03, 2010, Police and detectives evicted people from a property in the Hanga Roa civic center, an area claimed by the Tuko Tuki Clan. A total of 17 persons were injured in this episode, and in some cases the "perdigones" (shotshell) used has not been able to be extracted. Some detainees were taken to the Mataverí Police Station while others were taken to the local hospital. The families allege mistreatment inside the Police Station and negligent delay in obtaining medical care. They also denounced the taking down and burning of Rapa Nui flags that flanked the disputed property, by the Police.

This event was included as additional information in the request for precautionary measures to the IHRC and led to a notification being sent to the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Mr. James Anaya.

Subsequently, in mid December, in hearings held in two criminal investigations before the Easter Island Supervisory Judge, the prosecutor formally charged five members of the Tuko Tuki Clan with the crimes of peaceful usurpation and unauthorized entry of abode. In these hearings, precautionary measures were enacted which prohibited access to buildings, by virtue of which the Police then proceeded to evict occupiers from the Civic Center. Clan members denounced the violation of a series of procedural guarantees in the hearings, such as the exclusion of an interpreter requested by the defense. They also denounced the eviction of people who were not included in the precautionary measures but who were still threatened with excessive use of force.

This event led to sending another letter of notification to the United Nations Special Rapporteur on Indigenous Rights, Mr. James Anaya.

c. Riro Kainga Plaza

On December 29, 2010, another violent eviction was carried out in the Riro Kainga Plaza occupied by the Rapa Nui Parliament and members of the Rapa Nui Clan, culminating in several people being injured and 10 arrested, two of whom were left in custody for arms control law breaches. This situation was also notified to the Rapporteur Anaya.

On January 12, 2011, the United Nations Special Rapporteur on Indigenous Rights issued a statement concerning the situation of the Rapa Nui, in which he stated that on January 10, 2001, he recommended the following to the Chilean Government:

"(...)to prevent further evictions and to ensure that police presence on the island does not

exceed what is necessary and proportionate to ensure the safety of the island's inhabitants. (...)"

"I have also urged the Government to make every effort to conduct a dialogue in good faith with representatives of the Rapa Nui people to solve, as soon as possible the real underlying problems that explain the current situation. I believe that it is particularly acute in relation to the recognition and effective guarantee of the right of Rapa Nui clans on their ancestral lands, based on his own customary tenure, in accordance with ILO Convention 169, of which Chile is a party, and other relevant international standards.

"Finally, I made an urgent appeal to Government to take the necessary measures to avoid threats or harm to the physical safety of members of the Rapa Nui people and punish those responsible for any excessive or disproportionate use of force during the police operations of eviction."

On February 07, 2011, the IHRC granted a precautionary measure in favor of the Indigenous Rapa Nui people on Easter Island, in Chile (MC 321/10), requesting the State of Chile to immediately cease the use of armed violence in the execution of administrative or judicial State actions against members of the Rapa Nui, including evictions from public spaces or fiscal or private property; to ensure that the actions of Government agents, in the framework of the protests and evictions, do not put the life or the personal integrity of members of the Rapa Nui people at risk; to inform the IHRC in a period of ten days about the adoption of these precautionary measures; and to update this information periodically.

In addition to the aforementioned Precautionary Measure issued by the IHRC and the Statement of the United Nations Special Rapporteur on Indigenous Rights, the criminalizing of occupation and accompanying police abuse generated a series of denunciations by the Rapa Nui and their representatives. They held marches and demonstrated, filed written

complaints with the authorities, filed lawsuits alleging police abuse, as well as engaging with Parliament members and the National Human Rights Institute, which has reported on the situation.

In our view, the land occupations are a strong, determined call for the Island lands to be returned to Rapa Nui control. The land claims described above are all on the main street, in a small area that the State ring-fenced for Rapa Nui occupation after they were forcibly removed from their lands and sent to Hanga Roa in the late 19th century.

2.2.2 Return of Lands

Whether lands should be returned to the Rapa Nui in individual land titles or under collective title is something that needs to be worked out by the State with Rapa Nui, within the framework set by international standards and respecting traditional Rapa Nui land uses. It is important not to be stalled by paternalistic fears, such as those expressed by a Chilean government authority who told us that returning lands to families will only create inequality among its members.

Ancestral indigenous ownership of a collective nature enjoys widespread recognition in international human rights laws, through legal instruments ratified and in force in Chile, as well as under the Indigenous Law.

Article 1° of Chilean Indigenous Law N°19,253 of 1993 recognizes that for *"indigenous peoples of Chile...the land is the main foundation of their existence and culture"* and places a duty on the Chilean government to promote and respect their lands: *"[I]t is the duty of society in general and the State in particular, through its institutions, to respect, protect, and promote the development of indigenous peoples, their cultures, families, communities, adopting the appropriate measures for said purposes and to protect indigenous*

*lands, ensure their appropriate exploitation, their ecological balance, and favor their expansion".*⁴⁵

ILO Convention 169 requires Governments to respect the special importance of indigenous peoples' relationship with their lands and territories, understood as *"the total environment of the areas which the peoples concerned occupy or otherwise use"*.⁴⁶ The Convention states that the right to ownership and possession of lands traditionally occupied must be recognized and that the use of lands to which they have had historical access must be ensured, including lands not exclusively occupied by them. In addition, it compels State parties to take the steps necessary to identify such lands and to establish adequate procedures within the national legal system to resolve land claims.⁴⁷

It is important to keep in mind that the committees who supervise the ILO Convention 169 have been adamant in maintaining that the right to land ownership under Article 14 not only obliges States to protect and recognize those lands legally owned by indigenous peoples, but also includes traditionally occupied lands to which they do not have legal title.

Thus, the ILO Committee of Experts on the Application of Conventions and Recommendations, with respect to a claim filed for the violation of ownership rights of indigenous peoples in México in 2009, stated the need to acknowledge traditional ownership. The Committee stated in its 2009 report:

"If indigenous peoples are unable to enforce their traditional occupation as a source of ownership and possession rights, Article 14 of the Convention would be emptied of content. The Committee is aware of the complexity of turning this principal into legislation, and of designing adequate procedures, but stresses at the same time that the recognition of traditional occupation as a source of ownership

45 The highlighting is ours.

46 Article 13 of the ILO Convention 169.

47 Article 14 of the ILO Convention 169.

and possession rights through an adequate procedure, is the cornerstone upon which the system of land rights lies, established by the Convention. The concept of traditional occupation may be reflected in different manners in national legislation but it should be applied.”⁴⁸

At the same time, Article 26.1 of the Declaration on the Rights of Indigenous People states that Indigenous Peoples have the right to “the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”, including not only the lands that they “traditionally occupy” but also lands that have been confiscated illegitimately. This is reinforced by Article 28, which states:

“[The] right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”.

The Inter-American Court of Human Rights has adopted and developed land rights in its jurisprudence. Since the *Awás Tingni* case, it has insisted on the importance of recognizing the close ties of indigenous peoples with their lands, emphasizing that “they must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival”.⁴⁹

In *Awás Tingni vs. Nicaragua* (2001), the Court declared a violation by Nicaragua of Article 21 of the American Convention of Human Rights [“ACHR”], which protects the right to land

ownership, because it had not ensured “the use and enjoyment of the properties of the Community members; it has not delimited and demarcated its communal property, and has granted concessions to third parties for the exploitation of assets and resources located in an area which may correspond, fully or partially, to the lands which should be delimited, demarcated and titled”.

Awás Tingni recognizes and establishes:

1. The value of communal property of indigenous peoples under Article 21 of the ACHR;
2. The validity of the possession of land based on indigenous customs, even in the absence of land titles, as being the fundamental basis of their ownership;
3. The need for the close relationship that indigenous people have with their land to be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival; and
4. The obligation of States to delimit, demarcate, and give titles to community territory.

The Court has reaffirmed its interpretation of the scope of indigenous land rights in later cases. It has recognized rights of a communal nature over ancestral lands to communities in *Yakye Axa vs. Paraguay* (2005), *Sawhoyamaka vs. Paraguay* (2006), and *Xámok Kásek vs. Paraguay* (2010).

Unlike the *Awás Tingni* case in which the land claimed by the indigenous peoples was held by the State, in these cases the land was owned by private third parties.

In the *Yakye Axa* case, the Court ruled that indigenous communal property prevailed over private property. It held that the ACHR recognizes the subordination of the use and enjoyment of properties to social interests and the close ties of the indigenous peoples to natural resources associated with their culture. It recognized the spiritual elements that emerge from their cultural relationship and which must be safeguarded under Article 21 ACHR.

⁴⁸ INTERNATIONAL LABOR CONFERENCE, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1a) General Report and referring to certain countries*, International Labor Conference, 98th session, 2009, p.742.

⁴⁹ Inter-American Court, *Case of the Mayagna Community (Sumo) Awás Tingni vs. Nicaragua* (2001), parag. 149.

The State was ordered to adopt measures to return traditional lands to the community, or if impeded in doing so, to provide the community with land of the same size and quality, chosen by agreement with community members.

In the *Sawhoyamaxa* case, the Court found that Paraguay violated the community's right to communal ownership. It held that possession of land is not necessary for recognition of ownership by the State and that indigenous ownership rights over their ancestral lands are not extinguished while they maintain their relationship with their lands, whether material or spiritual.

In *Xámok Kásek*, the Court reaffirmed this jurisprudence, which has been systematized by the IHR Court as follows:

*"[T]he Court recalls its jurisprudence in respect to communal ownership of indigenous lands, according to which: 1) traditional possession of indigenous people of land has effects equivalent to a property ownership title granted by the State; 2) traditional possession grants to the indigenous peoples the right to demand official recognition of ownership and its registry; 3) the State must delimit, demarcate, and grant collective title of lands to indigenous community members; 4) members of indigenous peoples that for reasons beyond their control have left or lost possession of their traditional lands retain the right of ownership over them, even in the absence of legal title, unless the lands have been lawfully transferred to third parties in good faith, and 5) members of indigenous peoples who have unwillingly lost possession of their lands, and these have been legitimately transferred to innocent third parties, have the right to recover them or obtain other lands of equal size and quality."*⁵⁰

⁵⁰ Inter-American Court, Case of the *Xámok Kásek Community vs. Paraguay* (2010), paragraph 109.

In establishing parameters for determining when the relationship of indigenous peoples with their traditional lands provides a justifiable claim to the land, the Court stated:

*"[T]o determine the existence of the relationship of indigenous peoples to their traditional lands, the Court has established that: i) it can be expressed in different ways depending on the indigenous people concerned and the specific circumstances that exist, and ii) the relationship with the land must be possible. Some forms of expression of this relationship could include the traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; hunting, fishing or harvesting seasonal gathering or nomadic activities; use of natural resources associated with their customs, and any other element characteristic of their culture. The second element implies that the community members are not prevented, through no fault of their own, to perform those activities that reveal the persistence of their relationship with their traditional lands."*⁵¹

Additionally, *Saramaka community vs. Suriname* (2007), the Court concluded that Article 21 of the ACHR protected the right to self-determination of indigenous peoples. It found that, in order to provide for continuity of their economic, social, and cultural lifestyle, they are entitled to use and enjoy the natural resources of ancestral lands traditionally occupied by them necessary for their own survival.

The Court made a clear link between the rights to ancestral property and the self-determination of indigenous peoples, based on the application of the United Nations Committee on Economic, Social, and Cultural Rights of common Article 1 and the Covenants on indigenous peoples.⁵² The Court interpreted Article 21 of

⁵¹ Inter-American Court, Case of the *Xámok Kásek Community vs. Paraguay* (2010), paragraph 112.

⁵² Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of

the ACHR as including the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural, and economic development as established in the Covenants. It stated that Article 21 of the American Convention cannot be interpreted as limiting the enjoyment and exercise of the rights recognized by Suriname in these Covenants.⁵³

The situation in Aotearoa New Zealand is an example of the types of future problems that can arise if land is returned in collective title. It may be helpful to review models of collective land ownership in Aotearoa and other parts of the Pacific to learn about the types of problems encountered and how these have been overcome.

Around 70 percent of Rapa Nui lands are held by the State of Chile. A large part of this land is protected as conservation land under the Rapa Nui National Park. This designation was made without the consent of the Rapa Nui, who are also excluded from participating in the administration of the Park.

We suggest that a system for co-managing the Park with the Rapa Nui people be explored. We are aware that successful, workable models of co-management exist in other countries in Latin America, in Aotearoa and may exist in other countries as well.

The guidelines proposed by the International Union for Conservation of Nature ["IUCN"] are helpful, as they recognize Indigenous peoples' and Community Conserved Areas ["ICCA"] and define them as "*protected areas where the administrative authority and the responsibility*

is held by indigenous peoples and/or local communities under diverse forms of institutions, norms, customary or legal, formal or informal". This definition includes two large categories: 1. Areas and territories of indigenous peoples that are established and managed by them and 2. Community conserved areas that are established and managed by the community.

Moreover, in the 2008 World Congress, the IUCN adopted 2 important resolutions:

1. Resolution 4,049 calls upon IUCN members to:

"(a) Fully acknowledge the conservation significance of Indigenous Conservation Territories and other Indigenous Peoples' and Community Conserved Areas - (ICT and IPCCAs) – comprising conserved sites, territories, landscapes/seascapes and sacred places - governed and managed by indigenous peoples and local communities, including mobile peoples;

(b) support the fair restitution of territorial, land and natural resource rights, consistent with conservation and social objectives as considered appropriate by the indigenous peoples and local communities governing existing ICTs and IPCCAs and/or interested in establishing new ones;

2. Resolution 4,038 on recognition and conservation of sacred natural sites in protected areas, including "*...springs of pure water, glaciated mountains, unusual geological formations, forest groves, rivers, lakes and caves - are today and have long been integral to human identity, survival and evolution*". It also states "*...that urgent action is needed for culturally appropriate sacred natural site conservation and management within (and near) official protected areas*".

These IUCN guidelines, and the International Human Rights Law applicable to the Rapa Nui, support the Chilean State restoring the lands traditionally occupied by the Rapa Nui, as "indigenous conservation territories" under their ownership and administration.

the Covenant. Final Observations on the Russian Federation (the thirty-first session). UN DocE/C.12/1/Add.94, December 12, 2003, paragraph. 11, in which the Committee expressed concern about the "*precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant*."

53 IHR Court. *Case of the Saramaka people vs. Surinam* (2007). Preliminary exceptions, Fund, Repairs and Costs, paragraphs 93, 94 and 95.

3. RIGHTS OF INDIGENOUS PEOPLES IN CHILE

In Chile, the Rapa Nui situation is framed within a general context covering several distinct indigenous groups. Rapa Nui do not have constitutional recognition, nor is there any official mechanism for consulting with them or ensuring their political participation. In spite of ILO Convention 169 being in force since September 2009, no clear measures for its implementation exist.

During our visit most of the officials interviewed, as well as those consulted informally by us, stated that the government was applying an ad hoc consultation process to indigenous peoples. It was viewed as being inadequate because it sought to achieve contradictory government objectives. These were identified as follows:

- Providing constitutional recognition to indigenous peoples;
- Establishing a new institutionalized indigenous framework suitable to government;
- Regulating environmental institutions and providing for indigenous participation;
- Gaining approval for investment projects involving indigenous land and natural resources, and
- Determining an acceptable consultation process with indigenous peoples.

In our view, trying to establish a complete relationship model between the State and the indigenous peoples without first developing a clear institutionalized process for consultation has undermined the entire process.

We are aware that this situation has altered since our visit in August 2011. Resistance by indigenous peoples to inadequate consultation processes has reduced discussions to “consultation about the consultation process”. We are concerned that no further progress has been made.

Decree 124 is seen as negating the consultation process under ILO 169, which, if properly conducted, would involve providing information, establishing open dialogue, and then implementing the will of the indigenous people. It would also involve obtaining their consent in regard to public decisions or policies, or proposed legislation that affects them. In this regard, we have been informed that indigenous peoples have called for the repeal of Decree 124 and a halt to mining and forestry investments, and any other projects which are intended to be carried out on Indigenous lands, because proper consultation has not yet occurred.

The Vice-President of the Senate of the Chilean Government, the Institute of Human Rights, and Mapuche representatives, with whom we met, all spoke of the need to look at and redefine the content and processes of consultation. They stated that it was necessary for the Rapa Nui to exercise control over their internal affairs and for the State to support this change. Instead, however, Chile has criminalized protests over long-standing land claims in 2010 and 2011. This is a situation that deeply concerns us.

Finally, we received widespread complaints about indigenous interests being undermined by the State’s “indigenous” agencies, which are managed and controlled by the State to meet its own economic needs and those of private investors. Even though these agencies have indigenous representatives, representation is in the minority and limited to the role of “advisors”. There is no obligation to uphold indigenous views.

Mapuche representatives in Santiago argued that Chilean legal structures must be modified to reflect the social and cultural needs of the people who are on the land, according to how they identify themselves. Such structures should not simply be imposed by the government, as it cannot represent indigenous interests without their permission.

4. CONCLUSIONS

The relationship between Rapa Nui and the State of Chile is weak, and has recently been one of direct conflict. It is characterized by mistrust that is based not only on historical precedents, but also on recent events that have involved the violation of Rapa Nui human rights by the State.

The historical literature consulted (including the Report by the Historical Truth and New Deal Commission, official documents issued by the Chilean State), and testimonies gathered on the island, all indicate that the annexation of Easter Island to Chile was realized by means of an Agreement of Wills in 1888 between the Ariki (King), Atamu Tekena, and a representative of the State of Chile, the Naval officer, Policarpo Toro.

Under this Agreement of Wills, an equitable relationship between the two peoples was established in which the Rapa Nui accepted the Chileans as “friends”, but reserved their lands and their right to govern the territory by their own authorities. This has never been respected by Chile.

We were informed that the island was leased to foreign capital and the Rapa Nui were confined to a small area of the island and subjected to a system of semi-slavery. They were deprived of the civil and political rights enjoyed by other Chileans until 1966 when they were finally granted citizenship.

After the enactment of the “Ley Pascua” in 1966, and in line with the recognition of the Rapa Nui as citizens, a Chilean administrative system was established for the island and public services were installed.

In spite of the above, the relationship between the two peoples is marked by unequal treatment by the Chilean state, which still does not recognize the 1888 Agreement of Wills and imposes its own conditions on the Rapa Nui.

The regime imposed by Chile on the Rapa Nui violates internationally recognized human rights of indigenous peoples to territory, self-determination and political participation.

Chile confiscated the entire territory of Easter Island from the Rapa Nui in 1933, when it registered the territory in its name. This registration was repeated in 1967, after the establishment of the Recorder of Deeds Office on Easter Island. Since registration, a few small plots of land have been granted to the Rapa Nui in individual land titles, while the Chilean State remains in possession of over 70% of the territory.

The violation of Rapa Nui territorial rights is closely linked to the recent criminalization of social protest. Rapa Nui viewed peaceful occupation as a legitimate way of supporting their land claims. In their view, these actions were met by excessive force by a Chilean state intent in its desire to repress.

Regarding the right to self-determination, we found the Rapa Nui demand for some form of self-government to be widely held, and even supported by some Chilean government members. The Chilean government, however, has not met this demand, despite signing the United Nations Declaration on the Rights of Indigenous Peoples. The “Special Statute” that it is formulating for Easter Island does not meet international standards set under the Declaration.

Finally, we conclude that the Rapa Nui situation is hampered by continuing to be framed within the general context for recognizing ALL indigenous rights in Chile. This has resulted in a lack of constitutional recognition of the special circumstances of Rapa Nui and a total lack of implementation of ILO Convention 169 in force in Chile since September 2009 especially in regard to political and territorial rights, consultation and criminalization of political protests.

5. RECOMMENDATIONS

5.1. As a general recommendation

The observers believe that the Chilean government should review its relationship with the Rapa Nui people and reconstruct it on the 1888 Agreement of Wills. This document should be recognized as an International Treaty which led to the annexation of Easter Island by Chile, and as laying the foundation for an ongoing institutional relationship with Rapa Nui. That relationship must be fair and equal and it must guarantee full participation of the Rapa Nui, as well as their rights to territorial and self-determination in a form acceptable to them.

This view is supported by the National Commission on Historical Truth and Reconciliation, which expressly states with regard to the Rapa Nui that:

“Taking into consideration the above and also the geographical particularities of Easter Island and the ethnic and demographic composition that characterizes it, the Commission is of the view that the commitments made between the Rapa Nui people and the State of Chile under the “Agreement of Wills” are fully contemporary and are an excellent basis for building an equitable relationship between the State of Chile and the Rapa Nui people, in the present historical moment. In this context, it is recommended to adopt the following measures:

1. To ratify the Agreement of Wills by the National Congress which should be approved as Law, because it contains general and mandatory norms that establish the essential bases of the legal system that will thereby regulate the relationship between the State of Chile and the Rapa Nui peoples, in accordance

with that provided in Article 60 N° 20 of the Constitution of the Republic.

2. To grant an autonomous status for Easter Island, in accordance with the normative assumptions of the “Agreement of Wills”.

3. To recognize the exclusive right of the Rapa Nui to land ownership on Easter Island, and to promote plans and programs to ensure the effective exercise of this right. This requires repeal of article 1° of the L. Decree. 2.885 of 1979, currently in effect in accordance with article 79 of the Law 19.253 of 1993, which allows non Rapa Nui persons to be beneficiaries of Easter Island lands.

4. To promote and fund programs aimed at guaranteeing the well being and development of the Rapa Nui people. In this context, it is considered as a priority to provide Easter Island with its own budget, which enables funding such plans and programs. The budget should be defined by the Executive power at the central level, in direct coordination with the recognized authorities in Easter Island.”⁵⁴

5.2. Recommendations made by the National Commission on Historical Truth and Reconciliation

We also share other recommendations made by the National Commission on Historical Truth and Reconciliation, especially those concerning the protection and conservation of Cultural and Natural Heritage. We recommend the

⁵⁴ National Commission on Historical Truth and Reconciliation Report, second part of recommendations, Page 571. Available at: [<http://www.memoriachilena.cl/upload/mi973056855-2.pdf>], translated by the authors of this report.

recognition of the language preservation rights and declaration of official language as Rapa Nui, the protection and administration by the Rapa Nui people of water resources and groundwater, the protection of the coastline and declaration of the entire Rapa Nui territory as Indigenous.⁵⁵

5.3 Right to self-determination of the Rapa Nui

We recognize the right to self-determination of the Rapa Nui under the 1888 Agreement of Wills and international human rights law, particularly the United Nations Declaration on the Rights of Indigenous Peoples. In this regard, we understand that the Rapa Nui demand for self-determination is oriented toward exercising autonomy in the form of self-government rather than complete independence from Chile.

We consider the development of a statute that defines the foundations for a regime of autonomy in internal and local affairs essential. Its formulation must include the active participation of the Rapa Nui, using their own representative institutions. It must allow them to set their own priorities for economic, social, and cultural development, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.

5.4. Legislation to control migration to Rapa Nui

We consider the establishment of legislation to control migration to Rapa Nui to be essential. Its contents should be formulated together with the Rapa Nui, fully respecting the international standards for proper consultation with indigenous peoples. This should be done in a way that ensures the preservation of the culture of the Rapa Nui and the protection of the island territory as a

fragile ecosystem that is especially vulnerable to irreversible environmental deterioration.

In order to uphold their right to self-determination, the migration control system should either be administered by the Rapa Nui, or through a system of co-management by the Rapa Nui and Chilean state.

5.5. Recognize traditional ancestral Rapa Nui land ownership

We believe that the State should recognize traditional ancestral Rapa Nui land ownership based on international human rights law applicable to indigenous peoples and in compliance with the 1888 Agreement of Wills. This requires the regularization and return of lands that were granted by means of temporary land titles or assignment of rights by the State of Chile to members of the Rapa Nui in Hanga Roa, and which are currently being held by the State of Chile or by third parties other than the Rapa Nui, as well as lands that were confiscated by the state registration of Island lands.

Whether land should be returned in collective or individual title is something that should be discussed and decided with the Rapa Nui, but it should be held in a form that is secure from future appropriation by the Government or foreign interests.

We support the administration by the Rapa Nui of such lands as indigenous conservation territories and sacred sites in accordance with IUCN guidelines.

5.6. The criminalization of Rapa Nui social protest should cease

We recommend that the criminalization of Rapa Nui social protest should cease and that the State should refrain from further actions involving violence against the Rapa Nui, particularly the use of disproportionate police force against

⁵⁵ *National Commission on Historical Truth and Reconciliation Report*, second part of recommendations, p. 559. Available at : [<http://www.memoriachilena.cl/upload/mi973056855-2.pdf>]

those involved in peaceful occupation. Peaceful resolution of conflict should always be sought, through intercultural dialogue and with full recognition and respect for the rights of the Rapa Nui.

5.7. We share the concern of various international human rights organizations relating to the situation of indigenous peoples in Chile.

In this regard, we agree with and adopt the recommendations made by the Special Rapporteur on indigenous rights, as proposed to the Chilean government in his 2009 report, and highlight those that, according to what we verified during our visit, are applicable to the Rapa Nui:

to proceed with the constitutional recognition of the indigenous peoples and their rights of consultation, in compliance with ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples;

to carry out a process of consultation with the indigenous peoples about the definitive consultation procedure to be implemented prior to taking any action or measure that may directly affect these peoples;

to establish a mechanism for recognizing the rights of indigenous peoples to land and natural resources based on ancestral occupation and use, resolving pending land claims and providing more resources to the government institutions responsible for this; and

to adapt current legislation, involving both public policies and sectorial laws as well as procedures for the acquisition of land, according to the standards of the ILO Convention 169 and international law.

VIOLATIONS OF THE RIGHTS OF THE RAPA NUI PEOPLE AND RAPA NUI INDIVIDUALS, ACCORDING TO THE AMERICAN CONVENTION ON HUMAN RIGHTS¹

Article 5. Right to Personal Integrity

It is often said that the moral integrity of the Rapa Nui has been denied by the State of Chile throughout the history of Rapa Nui. The usurpation of their ancestral lands by the Chilean Government and their forced relocation to a small and enclosed area on the island is a continuous abuse that must be rectified. The restrictions of the freedom of movement of the Rapa Nui on the island deprive them of the freedom of access to their traditional territories and of the use and development of their resources because these are under State control. The historical consequence of these actions is to significantly undermine the cultural, social, and economic wellbeing and development of the Rapa Nui.

The Rapa Nui believe that their dignity as a people is gravely undermined by the Chilean system of control over their lands. While international agreements such as ILO Convention 169 speak extensively of "consultation" and "consent" in relation to activities carried out in their traditional lands, Decree 124 weakens the due process guarantees of the legal system in order to ensure that the objectives of the State will prevail when clashes occur with indigenous interests.

Article 6. Prohibition of Slavery and Servitude

Up until 1966, the Rapa Nui had no citizenship rights and they were pressured to work as forced labor.

Article 7. Right to Personal Liberty

Evictions without a Court order. The evictions from the Civic Center were not preceded by a "court order for eviction". The occupants who had been charged the day before at the initial hearing in court were ordered not to approach the "residence of the victim", by which was meant the building located on the land being claimed. The following day, in the presence of a large police contingent, the authorities ordered these injunctions to be executed *ex officio* (without the request of the victim) and precipitated the incidents described above.

The response of the State, which consisted of shooting at seventeen people, was disproportionate to the objective of putting an end to the activity of the protesters occupying the public buildings.

Article 8. Judicial Guarantees

It was indicated to us that in the initial criminal hearings in December 2010, during which charges were laid against members of the Tuko Tuki Clan, a series of procedural safeguards were violated. They included the denial of the right to have an interpreter present, as requested by the defense, in order to present the cultural aspects of the case in the language of the Rapa Nui and in accordance with traditional law. Moreover, it was alleged that people were evicted who were not listed in the injunctions prohibiting certain persons from approaching the land in question, and that these people were threatened with violence.

¹ Author of this Annex: Professor Nin Tomas.

Also, we heard claims that rights were violated that are expressly guaranteed by Subsection 3 of Article 54 of Law N° 19,253 on Indigenous Peoples, and under international laws recognized by Chile. There is a State obligation to respect and take into account the customs of indigenous peoples when implementing national legislation, and to guarantee that native people can both understand and be understood in legal proceedings (Articles 8 and 12 of ILO Convention 169). An individual also has a right to be informed in his/her own language of any criminal charges, and to rely on the services of a translator (Article 14 of the Covenant on Civil and Political Rights).

In this respect, mention should be made that language is more than just words and sentences, and that true depth of meaning cannot be communicated or achieved by imposing the use of the dominant language (Spanish) on those whose mother tongue and concepts of justice are derived from within a different cultural context. Comprehension is better achieved through recognizing and applying the values, customs, and rules that are inherent in the *tangata henua* mother tongue.

Article 13. Liberty of Thought and of Expression

Article 8 is supported by Article 13, which guarantees liberty of thought and expression. The right includes a peoples' right to search, receive and distribute information and ideas of any kind through the media of their choice. Refusal to allow the use of the Rapa Nui language in Court is a violation of Articles 8 and 13, which support each other.

In the public protests during which public areas and property were occupied, no real threat ever existed to the rights of others, to their reputation, or to national security, such as might have justified the excessive limitations placed on the protestors. In this sense, the State's response was truly disproportionate.

Article 15. Freedom of Assembly

The Chilean State's response in criminalizing Rapa Nui protests is disproportionate, considering the absence of a direct threat to public security, wellbeing or to public morality presented by Rapa Nui Clans who were protesting to recover their ancestral lands. Their acts of protest did not interfere with the rights of other members of the public. It appears that the State triggered the violence of the protesters by forcibly removing them from the land. And when the protesters reacted, the authorities used excessive violence to repress a situation they themselves had created, and then justified their use of undue force by criminalizing legitimate protest.

In this respect, people told us repeatedly that the evictions were not backed up by a court order.

Article 16. Liberty of Association

This right was forcibly violated by the police force, and by the authorities' criminalizing the actions of legitimate protest carried out by the Rapa Nui.

Article 20. The Right to a Nationality

The Rapa Nui identify themselves as a people of the Pacific, rather than as members of Chilean society. With respect to a people's collective self-identity, the Inter-American Court is of the opinion that the identity of each indigenous community *"is a social-historical fact that is an essential part of the indigenous people's autonomy"*, whereby it is up to the community in question to determine its own name, composition and ethnic belonging; the State or other external agencies cannot decide on their behalf or contest this matter: *"the Court and the State must limit themselves to accepting the decisions made by the Community in this regard, that is, in the manner which the latter identifies itself"*.

This right should be interpreted in conjunction with the right to political participation established in Article 23, so that indigenous peoples, in accordance with their ethnic belonging, shall decide and determine their own representative institutions.

Article 21. Right to Property

All the jurisprudence developed by the IHR Court is applicable to the Rapa Nui case, based on the *Awes Tingi* case.

Article 23. Political Rights

The right to “participate in the conduct of public affairs” is based on the necessity to guarantee that the “freely elected representatives” may ensure a fair balance between the interests of the State and the Rapa Nui, in as much as the Rapa Nui define themselves as a distinct group with a distinct ancestry, different from that of the State that rules them.

The meaning of the term “participate” goes far beyond the need for the State to share information with the Rapa Nui, or the State informing itself of Rapa Nui points of view: it also means implementing the decisions and resolutions that are negotiated with the duly mandated and elected representatives of the Rapa Nui.

In this regard, the IHR Court has emphasized the obligation of the State to ensure the participation of indigenous peoples, through their own representative institutions, in the affairs that affect them, and has also recognized the relationship that exists between this right and the rights of participation and of free and informed consent set out in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.

Article 24. Equality before the Law

Under Chilean Law, the Rapa Nui have the right to protection “as Rapa Nui”. Their special condition of “Tangata Henua” – people of the land of Rapa Nui, and their ancestral rights to their territories should also be respected. These latter rights have not been recognized by the Chilean State, and the failure to do so affects the dignity of the Rapa Nui, as individuals, and as members of an egalitarian society.

Article 25. Judicial Protection

We were told that the Rapa Nui do not have the right to a simple, expeditious, and effective legal recourse that might enable them to exercise their human rights to claim their ancestral lands and exercise their right to free determination as a People.

Article 26. Progressive Development of Rights

In the case of Rapa Nui this means helping the islanders to achieve self-determination by means of dialogue between the State and Rapa Nui leaders, and the implementation of the necessary local and constitutional changes needed to ensure positive results for the islanders. The role of the State is to aid this development, and not to put obstacles in its way by perpetuating an administrative system based on laws that jeopardize the self-determination and self-realization of the Rapa Nui. To attain this objective, greater dialogue is needed between the Rapa Nui and the State, as well as a genuine desire on the part of the State to recognize the interests of the Rapa Nui, particularly when these interests do not coincide with the economic development agenda being pursued by the State.

INTERVIEWS

- Carmen Cardinali Paoa, Rapa Nui Governor;
- Jacobo Hey, Court clerk and former Governor of Rapa Nui;
- Luz Zasso Paoa, Rapa Nui Mayor;
- Juan Pablo Letelier, Senator and Vice-president of the Senate;
- Carlos Llancaqueo, Presidential Commissioner for Easter Island;
- Alfredo Seguel y Sergio Millaman, Mapuche, Grupo de Trabajo por Derechos Colectivos (G-TDC);
- Lorena Fries, Director of National Institute of Human Rights;
- Members of Rapa Nui Parliament;
- Members of Te Moana Nui A Kiva;
- Members of the Rapa Nui women organization Makenu Re'o Rapa Nui.

OTHER ACTIVITIES

Participation in seminar on “Los Derechos Humanos de los Pueblos Indígenas y sus implicancias para el Rapa Nui people” (The Human Rights of Indigenous Peoples and their implications for the Rapa Nui People), held in Hanga Roa on August 1st and 2nd, 2011 summoned by the Rapa Nui Parliament, the Rapa Nui women’s organization, Makenu Re'o Rapa Nui, Conadi’s National Indigenous Council for Rapa Nui People, Rapa Nui clans, Indian Law Resource Center, and Observatorio Ciudadano (Citizen’s Observatory), with the participation of about one hundred representatives of the most important organizations of the Rapa Nui people.