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Rapa Nui: the struggle for indigenous land rights on Easter Island

An analysis of the Chilean Supreme Court decision in the Hito case of
2012 and conjunction with the contemporary international legal
framework

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Abstract

This research paper analyzes the decision of the Chilean Supreme Court case of 2012 named Hito within the framework of contemporary international law. The case involves a private company which has been challenged with the right to property of its Hotel on Easter Island by the Hito Rangi, a clan belonging to the Rapa Nui, the indigenous community of the island. The decision of the Supreme Court is not merely remarkable for denying the Hito Rangi their claim to the territory. Inasmuch as the Court's decisive argument to deny the Hito Rangi -and implicitly the Rapa Nui community- any redress to traditional land rights under Chilean law is accorded to the legal standing of the island's annexation agreement, also known as the *Acuerdo de Voluntades* which it defines to have extinguished this right indefinitely. With a complete analysis of all relevant domestic, regional and international legislation and jurisprudence on the matter of traditional land rights (from the institutions and relevant instruments of the OAS and UN human rights systems) the paper has aimed to provide a critical analysis of the Court decision when comparing it to international law. Both historic and contemporary law is portrayed in order to grasp the intertemporal analysis of the issue. Concluding the Court decision most likely, according to contemporary international jurisprudence on the issue, violates obligations under international law by denying the Rapa Nui their indigenous land rights on the basis of domestic law. This follows regarding most recent and precedential jurisprudence by the Inter-American human rights Commission and Court, but also other national judgments on land right matters. According to concurrent jurisprudence of the Inter-American institutions, which has been reaffirmed by the relevant UN institutions the requirements in defining indigenous land rights rely on its assessment to be regarded independent to any prior identification by the state and rather be defined by objective evidence. Although in the past international law has been instrumental to dispossession of most indigenous territory, today it stands to undo these discriminatory practices. Not merely by requesting their equal treatment under state laws, but within its human rights framework build a system to actively promote and protect the rights of indigenous peoples in order to secure their survival.

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Foreword

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The entire timeframe in which I conducted research on and wrote this thesis I have done so with great pleasure. It has been an enormous privilege to commit my time to an issue which signifies the struggle of human rights and takes place in a country with which I have developed a special bond. Special thanks go out to the Universidad Diego Portales in Santiago, and in particular Antonia Rivas, who despite the fact that I had already returned to the Netherlands found the time to help me with inside Chilean research.

It has been an overall challenge to dissect the diversity and complexity of the many existing legal systems concerning indigenous peoples rights, a task which I could not have completed without the extensive guidance of my supervisor, Mieke van der Linden. Although I have written this thesis on my own, I could not have done it to this extent without her help and continuing enthusiasm concerning the subject. Thank you for your devotion and extensive support throughout the entire process. It has been an absolute pleasure to have worked with you.

Introduction

Land is the basis for the lives, cultures and identities of indigenous peoples¹

It is estimated that there are over 37 million indigenous peoples spread across seventy countries worldwide, from the arctic to the south pacific. They are the descendants of those who inhabited lands before people of different cultures or ethnic origins arrived.² While these communities practice unique traditions and are socially, culturally, economic and politically distinct from the dominant societies they live in, the International Bill of Human Rights (the UDHR, ICCPR and ICESCR) carries no specific references to rights for indigenous peoples, particularly in the case of their right to land or territory, property and resources.

Land rights in general are an important factor in human life, as they secure access to land which provides an essential role in a valuable safety net for shelter, food and income for all people.³ For indigenous peoples in particular, land is known to signify not only their means of subsistence, but more importantly their means of survival as ancestral lands carry fundamental importance for their collective physical and cultural survival. Although often neglected in the past, the continuously developing framework of human rights has opened doors to welcome a better protective framework for indigenous peoples specifically. With the adoption of the ILO Convention no.169 in 1989 and the UN Declaration on Indigenous Peoples in 2007 land rights have, for the first time been legally recognized as leading factors of the survival of indigenous communities.⁴

Be that as it may, indigenous communities are still challenged by states to access of the rights laid down in these international legal documents, as is the case in Chile, and particularly on Easter Island where the Rapa Nui indigenous community has its ancestral roots. In recent years the tensions between the Rapa Nui and the central government have risen to extreme heights. Following the most recent judgment of the Chilean Supreme Court (2012) in a case -surrounding the tensions- concerning an individual claim made by a clan of the Rapa Nui, the Hito Rangi. The decision of the Court was surprising in the light of recent international and regional developments on the issue of indigenous peoples' rights.

The Supreme Court rejected the indigenous claim to special derived indigenous land rights, on the basis of the historic and existing domestic legislation on land and property created by the government of Chile with complete disregard of its domestic or international legislation on indigenous peoples' rights. The judgment seems controversial as the Courts base their decision on the annexation document of 1888 which ceded the island to the sovereignty of Chile, of which the Rapa Nui has always contested legality. The case has become the basis for this research in which I aim to address and answer the question:

[What the legal consequences for the Rapa Nui rights to land and property are following the decision of the Chilean Supreme Court in the Hito case of May 2012] and [whether the judgment will find legal standing within the contemporary international legal framework on indigenous peoples' rights]?

This very specific case grasps the core of many indigenous peoples' disputes with states concerning land rights, and to what extent the international framework can protect and effectuate their internationally accepted rights. What are the margins and borders of their rights, or where does the state need to adjust its domestic system to ensure indigenous rights is an ongoing and developing subject highly relevant in the current international, globalizing arena? What makes the case of a remote indigenous community like

¹ UN Department of Economic and social affairs, *State of the world's indigenous peoples*, ST/ESA/328 United Nations 2009, p.54, available at: http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf

² UN permanent forum on Indigenous Issues *factsheet*, available at http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

³ Wickeri & Kalhan, p.2

⁴ Wickeri & Kalhan, p.4

the Rapa Nui so interesting is that it is an ongoing conflict and much of their future and survival depends on court decisions.

In order to conduct this research a number of things must be taken into account. First of all it is important to describe and interpret the court decision from first to last instance, in combination with a portrayal of the domestic legal framework of Chile to understand how the Courts have come to their decision. Because the key argument used by the Chilean courts lays in the effectuation of the annexation treaty of Easter Island to Chile, this treaty will be evaluated and interpreted in itself, as well and in relation to the current legal framework in an intertemporal analysis. All these issues will be dealt with in chapters one and two and will form an answer to the first part of the research question.

Then it is important to make a brief and specified overview of the international (United Nations) and regional (Inter-American human rights system) legal frameworks concerning indigenous peoples, and land rights in particular as the case relates only to the right to property. Especially because the court only refers to national legislation and leaves indigenous law outside its scope of application, it is important to verify their rights under international law. This will be done in chapters three and four. These overviews will provide for both the historical context (eighteenth to twentieth century) as well as the guiding global legal opinion of today's indigenous peoples' rights to be able to place the specific case of Hito in a larger context, once again through intertemporal and comparative analysis.

The research ends with a comparative analysis of the *Hito* case to a number of other court cases. A selection is made of those relevant in content, and varying between national, regional or internationally decided judgments, in order to give an impression of concurrent legislation at different levels and in different situations. The last three chapters will then give an answer to the second part of the research question.

In order to build the chapters, relevant legislation and jurisprudence will be the main source of information, together with relevant books and scholarly articles that aim at interpreting these documents. Evaluative or analytical research will be conducted upon all literary research to interpret and critically view the conclusion of the court.

The conclusion will combine the answers to the two parts of the research question and conclude the current status of indigenous land rights for the Rapa Nui.

1. National Legal framework Indigenous People's rights: the Republic of Chile

Chile, a young nation state, "evolved as a highly articulated and politicized nation with a historical background of Spanish colonization, Catholicism and political independence in the early nineteenth century."⁵ Chilean society looked up to western models of society and adapted them into their own society as to benefit from the opportunities they presented. Simultaneously, the country persisted to hold on to another set of its own values, in which people were raised to respect hierarchy, authority and power of religious, Roman Catholic paradigm. In a legal sense, this meant that everyone was to be treated equally but "in a manner that it did not affect the hierarchical structure of society."⁶

Within this societal structure the indigenous communities of Chile, and thus also the Rapa Nui, were found at the bottom of hierarchy. This status is significant for the framework built by the Chilean government asserted to these peoples over the course of time. This chapter will structure the development of the legal framework for indigenous peoples in Chile, with in particular the Rapa Nui. Its starting point being the annexation document of 1888, where Chilean rule over the island began, but also a general description of the island before it became Chilean territory is of importance in the assessment of indigenous claims.

1.1. Te Pito o Te Henua

Te Pito o Te Henua is the original title for Easter Island. The island, about 4000 kilometers off the South American Coast, is in the midst of the Pacific Ocean and probably one of the most remote islands on this planet. Historically, the ancestral community of the Island, the *Rapa Nui*, lived here in absolute independence from the rest of the world.⁷ One of the Rapa Nui most distinct cultural characteristics was and still is the importance they gave to the worship of their ancestors.

The ancestral stone statues are its main trademark worldwide.⁸ The community was self-sustaining and took the form of a monarchical and hierarchical society. The island's cultural development before its discovery had no relation with processes that shaped the main lands of the Southern Cone (which include the modern nations of Chile, Argentina and Uruguay).⁹ Their economic prosperity was founded in fishing and agriculture and the land was divided over a number of tribes, characterized by an internal and political social system. The absolute hierarchical system however, and power of the King, did not acquire a high level of consensus among the different lower leveled communities.¹⁰

Originally from Polynesian heritage, the Island was discovered in 1722 on Easter Sunday (the obvious reason why it is named Easter Island) by Jacob Roggeveen, a Dutch explorer. From then on it was visited by various explorers and adventurers of the eighteenth century. The explorers had little regard for the islanders and towards the end of this century turned the island into a slave market, with horrific implications for Rapa Nui society. So many were deported that at a certain point there were only 103 Rapa Nui inhabitants left on the island. Most of them had been deported as slaves to Peru where they were used to perform forced labor.¹¹ It was exactly during this period in time that the nation of Chile started showing significant interest in Te Pito o Te Henua and offered the few leftover Rapa Nui an alternative to total destruction.

⁵ Luis Roniger and Mario Sznajder, The Legacy of Human Rights Violations in the Southern Cone. Oxford University Press, 1999, chapter 1, p.8

⁶ Luis Roniger and Mario Sznajder, The Legacy of Human Rights Violations in the Southern Cone. Oxford University Press, 1999, chapter 1, p.8

⁷ Uriarte, p.2

⁸ ICHV 2003, p.266

⁹ Informe Comision Verdad Historica y Nueva Trato 2003, p.261-262

¹⁰ Uriarte, p.3

¹¹ Informe Comision Verdad Historica y Nueva Trato 2003, p.261-262

1.2. El Acuerdo de Voluntades 1888

All this took place within the so called “modern” era of colonization (roughly around 1500-1900), which marked discovery of the new world and the first point in history in which nations among one another engaged in international agreements. It was a period in time during which most of the world’s borders as we know them today would be constructed. This also counts for the island of Te Pito o Te Henua. Although its physical borders as being an island could not be adjusted, its social borders shifted significantly. Te Pito o te Henua was acquired by the state of Chile in 1888, under the government of José Manuel Balmaceda.

Naval officer Policarpo Toro played an important role in the relatively peaceful acquisition of the island. In the context of slave trade business on the island, he advised the Rapa Nui on the economic, social, cultural and political advantages they would gain if they would surrender their independence to the sovereignty of Chile, guaranteeing them freedom and equality. He travelled to the island, where he met Atamu Tekena, the King of the Rapa Nui. In name of the Chilean government, Toro promised to abandon slavery and prevent future maltreatment of the locals, returning most of them from Peru back to the island, under the protection of Chile’s sovereignty. All would be codified in a mutually agreed treaty.

El Acuerdo de Voluntades (“the voluntary agreement”), better known today as the annexation treaty, was signed by both parties on September 9th 1888 to finalize and formalize the acquisition of the island. The treaty was written in both Spanish and Rapa Nui with a bit of Tahitian (which is rather a spoken than written language) and divided into two documents (a) the convention and (b) the report.¹² The bilingual character of the treaty has caused various different interpretations of the Spanish and Rapa Nui version. The Spanish text comes directly from the original document, and the most accepted translation of the Rapa Nui version -which must be seen as a written text meant to be spoken- is found in the Report of the *Comisión de Verdad Histórica y Nuevo Trato* 2003.¹³

¹² Under figures 1 and 2 ([Appendices](#)) you can find the digitalized version, provided by the *la Biblioteca Nacional Digital de Chile*, accessed August 5 2013, at <http://www.memoriachilena.cl/temas/documento_detalle.asp?id=MC0012427>

¹³ Informe 2008, Appendices 1 and 2, pp.306-311.

	Estado de Chile	Rapa Nui (translation to Spanish)
Convention	<p>Cesión/Cession (written)</p> <p><i>Los abajo firmantes jefes de la Isla de Pascua, declaramos <u>ceder para siempre y sin reserva</u> al Gobierno de la República de Chile <u>la soberanía plena y entera</u> de la citada isla, <u>reservándonos al mismo tiempo nuestros títulos de jefes</u> de que estamos investidos y que usamos actualmente. Rapa Nui, Septiembre 9 de 1888.</i></p>	<p>Proposición/ Proposition (spoken)</p> <p><i><u>Juntos</u> el Consejo de Jefes del territorio hemos acordado dar lo superficial. El territorio no se escribe aquí. Ustedes dicen que hemos hablado en conversación de entregar el territorio de Te Pito o te Henua a la mano de la nación chilena (Chile) como <u>amigo del lugar</u>. Estará firmado por la mano del Consejo de Jefes del Territorio. La palabra del Rey a su Consejo: Acuérdanse que <u>el bienestar y desarrollo está sobre vuestra investidura</u> por mandato presente en el Emblema Rapa Nui que está en el acte presente a ustedes.</i></p>
	<p>[translation] The below found signatories -the Chiefs of Easter Island- declare cession/surrender, forever and without reservations, of the full and complete sovereignty of the above cited Island to the government of the Republic of Chile, while at the same time making reservations to uphold their chieftaincy titles, those which they use currently. Rapa Nui, 9 September 1888</p>	<p>[translation] Together, the Chief Council has agreed 'superficially'. The territory here is not ascribed to [Chile], but we have had a conversation that puts the territory of Te Pito o Te Henua in the hands of the nation of Chile, which is a friend of this place. This has been signed by the Chief Council of the territory. The King adds in spoken words to his Council: "In agreement that the primary mandate of Chile will be to invest in welfare and development, which has been included in the present act before you".</p>
Report	<p>Proclamación</p> <p><i>Policarpo Toro H Capitán de Corbeta de la Marina de Chile y Comandante del crucero Angamos oficialmente en esta declaramos aceptar salvo ratificación de nuestro Gobierno la cession plena, entera y sin reserva de la soberanía de la Isla de Pascua cession que nos ha sido hecha por los jefes de esta isla para el Gobierno de la República de Chile</i></p>	<p>Lo hablando a la reunion</p> <p><i>Yo Policarpo Toro H. Amigo Marino Capitán del barco con mástil Angamos de la Nación Chilena (Chile), llevo el mensaje del Consejo de Jefes con poder en el territorio de Te Pito o te Henua, en mi mano en este importante escrito donde dice que es lo que nos ha dado el Consejo de jefes de Territorio de Te Pito o te Henua para la Nación Chilena (Chile) es la palabra dentro del Documento escrito es este día. Esperarán la ratificación de la Nación chilena para coordinar y desarrollar la palabra escrita aquí.</i></p>
	<p>[translation] Policarpo Toro H., Lieutenant Commander of the Chilean Navy and Commander of the <i>Crucero Angamos</i>, officially declares acceptance of the ratification of our government to this cession/surrender, complete and without reservations of the sovereignty of Easter Island, as promised by the Chiefs of this island to the Republic of Chile.</p>	<p>[translation] "I Policarpo Toro H., Naval Captain of the <i>Angamos</i> fleet of the Nations of Chile and friend, bring the Chief Council -with the power over the territory of Te Pito o Te Henua- in my hands this important writing which mentions the Chief Council gives the territory of Te Pito o Te Henua to the nation of Chile. We await ratification of Chile to be able to coordinate and develop the words written down in this writing.</p>

The terms of the acquisition of the territory are those of cession -a mutual agreement between two equal parties, implying recognition of the Rapa Nui as a community- although the content of the *acuerdo de voluntades* could suggest different interpretations to the mode of acquisition of Te Pito o Te Henua, implying moreover occupation -the invasion by a state of a territory without any form of agreement and complete disregard of people possibly living in the invaded territory- by the Chilean government.

When literally translating the texts, the Spanish version does not provide any uncertainty concerning the intentions brought forth by the government of Chile. Chile explicitly wishes to annex Easter Island, only making minor reservations concerning the status of the Rapa Nui Chiefs, which would remain in place. They would be able to continue to govern their community as they always had before, but they would no longer have the power to govern the territories of the Island. This seems to imply however, that although the treaty was concluded between both parties and the Chilean government had aimed to recognize the

power of the Chief Council that ultimately the annexation was meant to be definite and permanent. According to Uriarte, the Spanish text implicitly indicates Chile practiced its right to occupation of the Island via the principle of *res nullius* (uninhabited territory).¹⁴ Nevertheless, although the content of the agreement does not grant Rapa Nui effective control over the lands, it does recognizing the status of the Rapa Nui Chiefs as having effective control over their people, implicating at the time the territory was definitely not presumed to be uninhabited. Furthermore the agreement was signed by both parties, even if at a later point in time the effectuation of the agreement was manipulated by the Chileans.

The translation of the Rapa Nui text is unclear, and far from identical to the Spanish text. According to translations this version explains the treaty as more of a friendly agreement between two parties, recognizing the Rapa Nui Chief with higher regard, and owners of the land. Recognizing Chile not as the state that took their land, but as the friend of Te Pito o Te Henua (“amigo del lugar”) willing to provide protection and development under its sovereignty, moreover a compromise. Significant is also that those Chiefs who signed the Spanish document together with King Atamu Tekena signed an X for their names, because they could not write. Spoken words during the negotiations therefore resembled as much, if not greater importance in comparison to the written text to the Rapa Nui, and this was reemphasized time and again by the (renewed) Council(s) of Chiefs of Rapa Nui.¹⁵

Atamu Tekena claims to have proposed clear reservations concerning the right to land for the islanders and claimed Policarpo promised him progress, development, protection, respect and education in return for giving up only their sovereignty to the State of Chile, these were spoken words between the two that could be verified by witnesses of the draft process of the treaty, but none of these were added in either version of the agreement.¹⁶ During the cession ceremony Tekena ultimately made a significant gesture to reconfirm his intentions: “*cogio un trozo de pasto con tierra entregandolé el pasto a los comisarios, quedandose con la tierra.*”¹⁷¹⁸ With this he made clear that he gave up sovereignty, yet upheld the inalienable and ancestral right to land for his people. To him and his people, these words were worth more than the treaty itself, to the Chilean government it was the other way around.

Whether the promises of development and protection, made by Policarpo on behalf of the government were honest promises or not, the governments acts after cession spoke much louder than its words. When the cession was finalized, the state leased (through a written contract) the territories of Te Pito o te Henua to the British company Williamson & Balfour -a British company later transformed into the *Compañía Explotadora de Isla de Pascua* (CEDIP)- who in the following years used the lands to farm and herd sheep. The contract was legalized by the government in under art. 590 of the Codigo Civil: “*son bienes del estado todas las tierras que, estando situados dentro de los limites territoriales que carecen de otro dueño*”¹⁹, confirming the implication that Chile had always tried to obtain full control over the island. Now that it had dismissed any agreements a policy of *res nullius* was adopted. In 1933 the island was registered as Chilean Public land (*tierra fiscal*) on the basis of the idea that the island “lacked an owner” at this time, disregarding that only half a century earlier they had concluded a mutual agreement with the island’s Chief Council.²⁰

1.3. Chilean de-colonization

Before the cession various French and British missionaries had already travelled to Te Pito o te Henua and fraudulently bought land, turning it into a well-functioning sheep herding business and after the cession

¹⁴ Uriarte, p.54

¹⁵ Consejo de Jefes de Rapa Nui et al., 1988

¹⁶ Uriarte, p.56

¹⁷ [Translation] He took a piece of grass and soil together from the land, and gave the grass to the commissioners while keeping the soil in his own hands

¹⁸ Informe 2008, p.277

¹⁹ [Translation] All goods of the State are those lands which are within the State’s territorial borders and have no owner

²⁰ Delsing, p.2

Williamson & Balfour continued these practices as if nothing had changed, except they now worked under contract with the Chilean government.

The companies were ruthless and left practically no land to the Rapa Nui. At a certain point in time the Rapa Nui were forcefully transported to Hanga Roa (now the island's capital) which was a closed off area, surrounded by fences and stone walls to prevent the Rapa Nui from scattering over the island and interrupting business. The British exploited the island's resources for private advantage and produced large amounts of wool which they exported abroad, meanwhile starving the islanders by depriving them of their liberty and providing too little food to sustain them.²¹ As time passed by the Rapa Nui continued to be out casted and discriminated against, neglected and abused under 'colonial' rule, and although Chile was not directly responsible for the abuse, they neglected to take any action in countering it either. Because the law did not entitle the Rapa Nui to any form of citizenship, they also had no means to flee the island due to a lack of identity documents. Although the island's resources and cultural heritage were well protected and subject to many rules and regulations between the government and private contractors, all benefits were cashed in for the main lands and the rights of the Rapa Nui were not recognized until halfway through the twentieth century.

In 1916, over a decade after the invasion by the British, the Minister of land and colonization 'freed' the Rapa Nui from the CEDIP by terminating all contracts with third parties on the island, arguing suddenly that the ongoing abuse could no longer be tolerated and once again coming to the rescue of the islanders.²² In 1917 *Ley No. 3.220* was enforced subscribing the effective governance of the island to the Directorate of the Navy of Valparaíso. The law created one school and reserved 2000 acres of land for use by the Rapa Nui.²³

The sudden change of heart turned out to be an empty promise. Citizenship was still not recognized and despite its allegations towards the CEDIP, Chile renewed their contract only a few years later.²⁴ This was partially due to renewed governance of the Navy, and under harsh military rule abuses and violations continued and up until 1966 the fundamental rights of the Rapa Nui continued to be severely violated, now by both the private companies and the governmental agencies. They were forced to perform manual labor for the Navy; they were subjected to detention and punishment and were prohibited to move freely across the island, travel beyond the island or obtain a passport or any other form of identity document because they were not entitled to a nationality.²⁵

Ley de Pascua No. 16.441 (enforced in 1966) was the first law that actually made significant progress, granting the islanders a few basic rights in order to protect and promote their development. They were finally granted citizenship which enabled them to move around freely and the CEDIP withdrew completely.²⁶ Subsequently it created the first Municipal Government of the Province of Easter Island, which included newly installed public services such as a municipal office, a court, a police station and a bank. The law also empowered the state to grant titles (permits of exploitation of property), although this did not entitle locals to much more than they had had before.

Instead of giving the Rapa Nui more independence as a result of acknowledgement of their wrongdoings, the Chilean government did the opposite and tried to integrate the Rapa Nui in Chilean society, identifying them as Chileans.²⁷ Resistance of the Rapa Nui in order for their identity to survive prolonged their struggle. Despite all setbacks their belief and hope of being granted their rights persisted, countering the States unfair dispossession of 'their' lands. Although the *ley de Pascua* had granted them some form of

²¹ Informe 2008, p.280

²² Informe 2008, p.283

²³ Easter Island has a total area of 163.6 km², in comparison 2000 acres is about 8.1 km²

²⁴ Pereyra-Uhrle, p.136

²⁵ Antonia Rivas, p.193

²⁶ Rivas, p.194

²⁷ Delsing, p.2

property it did not give them back their land. Most of the territory on the island they had been dispossessed of was determined to become national (protected) territory where no one was allowed to live under any circumstances. Most Rapa Nui received some property in and around Hanga Roa, where they had been living for many decades now. A number of Rapa Nui soon after the distribution of property, agreed to expropriate some property in and around Hanga Roa in order for the government to build schools and roads, to provide for infrastructure and education on the island. In return the government promised them relocation or significant compensation of property, but many found themselves still waiting for this promise today.²⁸ Ultimately the *ley de Pascua* was there for the Rapa Nui, but could be reversed at any time by the government.

In 1973 the Chilean government was overthrown by a coup, led by General Pinochet. The military took over government under repressive rule. For Te Pito o Te Henua, the changes made by the military *junta* were surprisingly lenient.²⁹ The Easter Island provincial municipality under the Navy was suspended and a Military Governor of Rapa Nui heritage, Sergio Rapu Haoa, was installed as the island's new head of government. It was the first time a local was granted such a status.

In 1979 the *Decreto Ley No.2.885* was installed. This law created the possibility to donate land or transfer the title property of land to 'regular occupants' (people born on Easter Island or children of parents born on Easter Island who had lived there for at least 5 years). It was the first time since the annexation that Rapa Nui could obtain individual property titles in complete equality of other Chilean citizens. The Rapa Nui reinstalled their *Consejo de los Jefes* in order to recreate their former societal system and divide the lands in their traditional manner.

The titles given by the *Decreto Ley* ultimately provided for partial property rights (*titulos provisarios*) which allowed beneficiaries to use the land, not effectively own it.³⁰ The *Consejo de los Jefes*, determined to further Rapa Nui rights beyond a general right to property, sent a letter to the Military Junta around 1979, asking them to annul *Decreto Ley 2.885* and recognize the Rapa Nui as the only legitimate owners of Te Pito o te Henua to finalize their official and independent recognition. Unfortunately the *Junta* never responded. Their political structure, although internally well-functioning, was never legally recognized by Chile. Easter Island was not a priority matter for the junta, and it seemed their main aim had been to install a system which would have the effect of creating a level of political peace and silence among the islanders, as it did on the main land.

1.4. Democracy and the Ley Indígena

After seventeen years of repression under harsh leadership of dictator Pinochet, Chile finally returned to democracy through a peaceful wave of opposition in 1990. Not only Chile, but the entire Southern Cone experienced a wave of transition to more democratic rule and social peace after decades of authoritarianism and political violence. Indigenous groups were prominent among the social sectors of society and took advantage of new space for political expression and dissent.

The new reform oriented government led by President Aylwin responded to the indigenous protest (which led by the Mapuche, an Indian indigenous group from the main land) with a variety of initiatives to grant constitutional recognition, improve the quality of indigenous citizenship, create opportunities of self-identification and increase local control over land and natural resources. This was performed among the trend among the international community, where the beginning of the 1990's is seen as the up rise of indigenous peoples in the international arena. These reforms created new opportunities for various indigenous groups all over Chile, but also exposed contradictory agendas and sharpened conflicts concerning many issues.³¹

²⁸ Pereyra-Uhrle, p.137

²⁹ Pereyra-Uhrle, p.137-138

³⁰ Delsing, p.15

³¹ Rodrigues & Carruthers, p.3

1.4.1. Definition of Indigenous Peoples

Under great pressure by multiple protests of indigenous and tribal groups over the entire country and in return for the political support by many indigenous groups during elections, Aylwin rewarded them with a dialogue under the framework of the *Commission Especial de Los Pueblos Indígenas* (CEPI) who drafted and later passed a new law which for the first time recognized indigenous populations and specific rights thereof.³² This law was enforced in 1993 and is known as the *Ley Indígena No. 19.253*. The law, for the first time, recognized eight indigenous groups amongst which the Rapa Nui of Easter Island in article 1:

*“El Estado reconoce que los indígenas de Chile son los descendientes de las agrupaciones humanas que existen en el territorio nacional desde tiempos precolombinos, que conservan manifestaciones étnicas y culturales propias siendo para ellos la tierra el fundamento principal de su existencia y cultura.” “El Estado reconoce como principales etnias indígenas de Chile a: la Mapuche, Aimara, **Rapa Nui** o Pascuenses, la de las comunidades Atacameñas, Quechuas, Collas y Diaguita del norte del país, las comunidades Kawashkar o Alacalufe y Yámana o Yagán de los canales australes.”³³*

[Translation] *“The law recognizes the Indigenous peoples of Chile as being distinct from any other ordinary Chilean citizen because they were descendants of those who had lived on Chilean territory since before colonization, with their own culture and whose ethnicity, culture and existence is founded on the land they live on”. “The State recognizes as the main indigenous peoples of Chile: the Mapuche, Aimara, **Rapa Nui** or Easter islanders, the Ataca communities (Quechas, Collas and Diaguitas of the North), the Kawashkar/Alacalufe communities and the Yámana/Yagán of the South”.*

The newly predominant adopted conception that indigenous peoples rights require a certain form of independence, necessary for their survival as culturally, socially, economic and politically distinct communities was adopted by Chilean policy. The definition was established strictly and only those who comply under the requirements of art. 2 *Ley Indígena* could be qualified as descendants of these indigenous groups, luckily the Rapa Nui were added.

1.4.2. CONADI and CODEIPA

The *Ley Indígena* also called for the creation of a new institution to promote indigenous culture and development under article 66 onwards. The CONADI (National Corporation for Indigenous Development) a special commission for indigenous development, was established in order to incorporate indigenous groups directly in political participation with the state as agents of their own political futures. The objective was to create a venue in which indigenous peoples could express their own ideas about how their communities should develop, including the promotion and defense of political rights (recognition and representation), education, economic development, development of human resources, preservation of indigenous culture and identity and territorial restoration.³⁴

The CONADI executive council is held in charge of registration and maintenance of indigenous territory in the *Registro Público de Tierras Indígenas* (created by virtue of art. 15 *Ley Indígena*). Indigenous territories are those defined under art. 12 (1) and (2) *Ley Indígena*. Paragraph one is devoted to domestic laws which have provided for indigenous territory and paragraph two speaks of indigenous territory if the territory has historically been occupied by indigenous peoples. All must be registered under the *Registro Público* to legally hold rights of indigenous territories. The additional protocol to the *Ley Indígena*, *Decreto No. 150* of May 17 1994 defines under article 2 that the state has made four divisions of indigenous territory registration, the second one being the *Registro Insular* concerning territories in the province of Easter Island, for the Rapa Nui. The protocol does not specify exactly which territories on the island are

³² Rodriguez & Carruthers, p.5

³³ Ley 19.253 DO 05.10.93

³⁴ Rodriguez & Carruthers, p.5

registered as being indigenous.³⁵ This is important as it exemplifies the government granted itself -rather than indigenous communities- control of defining indigenous territories by means of this article.

The *Ley Indígena* also established a special institution for Easter Island, CODEIPA (*Comisión de Desarrollo de Isla de Pascua*) under article 67 with a similar structure to the CONADI. The CODEIPA was a rather peculiar institution, yet a lot more effective than the CONADI, and known to have become increasingly notorious for its ideas of governmental innovation, allowing Rapa Nui to participate in policy-making processes. A strange act encountered during many CODEIPA meetings about the Rapa Nui specifically is that both indigenous and non-indigenous discussions have, over the years, continuously included the *Acuerdo de Voluntades*, the annexation agreement of 1888. It seems to affirm that main issues they are struggling with today (land ownership and self-determination for the Rapa Nui) are still being denied due to governmental legitimacy of Chilean presence on the island because of this agreement. It was also the decisive argument of the judiciary in the *Hito* case.³⁶ All discussions lead back to the dispute over the legal status of the document, as both sides argue differently according to either Spanish or Rapa Nui interpretations. This does not disregard the fact that essentially the CODEIPA has managed to further development on the island increasingly over recent years.

1.4.3. Ratification of international (legal) documents

Besides making changes in its national legislation, it is important to note Chile has also ratified a number of regional and international documents for the recognition of indigenous peoples' rights specifically. Making it liable under international law for violations of the rights protected by these instruments. It has ratified as a member of the Organization of American States (OAS) the *American Declaration on the Rights and Duties of Man* automatically, and autonomously the *American Convention on Human Rights*. This implies importantly that it recognizes the competence of the regional monitoring mechanisms, namely the Inter-American Commission and the Inter-American Court on Human Rights installed by the OAS. It has made one minor reservation to the right to property under art. 21(2) of the American Convention stating: "when they apply the provisions under art. 21(2) the Institutions may not make statements concerning the reason of public utility or social interest taken into account in depriving a person of his property".³⁷ This concerns property matters in general and has no particular reference to indigenous right to property.

Chile has also ratified the (First) *Optional Protocol to the International Covenant on Civil and Political Rights* on the 27th of May 1992, making one reservation with respect to its recognition of the HRC competence to receive and consider communications from individuals that "it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990."³⁸ This could pose problems for the case of the Hito family with regard to admissibility of their case before the HRC, as the event of dispossession of property occurred in 1980.

Additionally Chile has ratified the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), in 2008 and respectively 2007. Both documents entered into force on September 15th 2009. At the same time however, *Decreto Supremo No.124* (like an additional protocol) entered into force, which severely limited the application of the standards put forth in ILO Convention 169. It restricts the right to consultation (art. 6 ILO 169). What is more is that it not only restricted the provisions of the ILO

³⁵ CONADI, Ministerio de Desarrollo Social, 'Registro Publico de Tierras Indígenas', accessed 17 July 2013, at <<http://www.conadi.gob.cl/index.php/registro-publico-de-tierras>>

³⁶ Gomez, p.12

³⁷ Department of International Law, Organization of American States, 'American Convention on Human Rights signatories and ratifications', accessed June 26 2013, at <http://www.oas.org/dil/treaties-B-32_American_Convention_on_Human_Rights_sign.htm#Chile>

³⁸ United Nations Treaty Collection, 'Status Optional Protocol to the International Covenant on Civil and Political Rights', accessed June 27 2013, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#EndDec>

Convention, but also infringed upon the implementation of national legal norms in a way that constitutional and legal standards are now regulated by a governmental act and not by law.³⁹

1.5. Conclusions

Chile has been and is a country that preferably portrays itself to be among the world's western nations. It participated as a nation state since the early nineteenth century -although not as part of Europe- and its acquisition of Te Pito o Te Henua through cession was common practice for (civilized) nation states around the beginning of the twentieth century. Towards the end of the twentieth century, when recognition for indigenous peoples was finally accepted at international level it participated eagerly in creating laws that would from thereon protect indigenous peoples. Essentially however, Chile was once and remains a highly traditional society where class and hierarchy play an enormous important role; this culture of class distinction has remained prominent throughout history and has always been highly valued despite its discriminatory nature. Indigenous communities, once at the bottom of the ladder still remain there in terms of economic prosperity and political influence, despite the rise of overall living standards.

Despite various attempts of the Chilean government to come to the rescue of the Rapa Nui community, the government lacks to understand the traditional construction of its indigenous community and rather implies they adapt to the dominant society. Exactly the issue many indigenous peoples face as the endurance of their traditional way of life is the only way they can survive and precisely what indigenous rights must aim to preserve.

Furthermore historical facts show that when indigenous demands, not only of Rapa Nui but also other communities, run counter to the State's development interest, state agencies and policies perpetuate a historical pattern of siding with private companies against the expressed interest of indigenous communities.⁴⁰ It has formally legalized protection in domestic law and by ratifying all international treaties on indigenous peoples' rights it bound itself to internationally defined protection, yet effectively the living standard of indigenous peoples in Chile remains far below standard.

This will become clearer by analyzing the *Hito* case, which touches upon all spear points mentioned in chapter one that have disabled the Rapa Nui from gaining full effective control.

³⁹ Rivas, p.183/185

⁴⁰ Rodriquez & Carruthers, p.6

2. Diana Eliana Hito vs. Sociedad Hotelera Interamericana Chile S.A

When describing, analyzing and interpreting a court decision it is important to keep certain general legal consensus in mind, but in all cases it is also very important to take a close look at the specific facts of any case, as no one case is identical to another, especially where it concerns indigenous peoples defined by their variety in culture, social structure, historical background and so forth. In the case of the Hito Rangi clan, emphasis on the case decision lies in the interpretation of property rights with relation to the annexation treaty of 1888, and the complete disregard for the application of indigenous peoples' rights.

2.1. Background information

As described in chapter one the struggle for the Rapa Nui to retain and regain their ancestral lands on the island of Te Pito o Te Henua has been long and difficult. Various movements of resistance against governmental control of the lands have existed in many forms for many years, grounded in public discontent of a system of private ownership, determined by the domestic legal system of Chile, allowing all individuals to subscribe to island property.

Currently only 13.65% of all the land is owned by Rapa Nui families on the basis of formal private ownership. Approximately the same amount of territory, 13.61% is owned under private governmental ownership. The rest is still subscribed to the state treasury and is thus also under state control.⁴¹ Most of the land sold has also not been distributed evenly among the Rapa Nui population, but expropriated to the more wealthy Rapa Nui families, other Chileans or foreigners who use the land to build public or private services (i.e. hotels), profiting from the island's main source of income: tourism. This significantly violates indigenous protective legislation (e.g. *ley Indígena* and *ley de Pascua*).

2.1.1. The reason for conflict

The circumstances under which the *Hito* case was brought to court play an important role in the contextual visualization of state action regarding indigenous peoples' demands in Chile. In August 2010, members of different Rapa Nui clans initiated peaceful occupations of public and privately owned buildings in the Capital of Hanga Roa. Their intentions constituted reclamation of the property these buildings were built on, formerly owned by Rapa Nui families. Through their actions they aimed to demand recognition of their ancestral title to the area, and refused to leave until changes were adopted. In the continuance of occupying a number of buildings until the beginning of 2011, the Special Police Forces were mandated by the central government to take over the 'situation' by violently evicting the occupiers from the properties.

Via a Court order of the *Jues de Garantia* of Easter Island, the police entered the occupied buildings, first requesting everyone to leave, and adding later that those who did not would be taken out with violence. A number of people were detained, including children and elderly, and many were injured. The Chilean press wrote many stories about the occupations in Hanga Roa in criticism of the public disturbances caused by the Rapa Nui yet seem to provide little information about the forceful evictions and practically never touch upon the historical issues that have brought forward these extravagant actions.⁴²

In response to the evictions, the government initiated an investigation to determine whether the evictions had been executed legally or whether the use of force constituted a criminal act on behalf of the state. The attorney General to the cases even appointed a deputy prosecutor to pursue the criminal acts committed by the Rapa Nui.

The evictions, disproportionate use of force and Court hearings soon motivated international negative reactions to the State action. Eventually prompting a request for precautionary measures by the *Indian*

⁴¹ Rivas, p.194

⁴² Rivas, p.191-192

Law Resource Center to the Inter-American Commission of Human Rights (IACHR).⁴³ James Anaya, the UN Special Rapporteur for the protection of indigenous peoples, reported the maltreatment of the Rapa Nui by the police, excessive use of force and delayed medical care to the injured in a communication to the Commission. This was also incorporated in the request by the *Indian Law Resource Center*. Shortly after the evictions James Anaya subsequently submitted a declaration, recommending the government of Chile to refrain from using violence against the Rapa Nui and to try to initiate a dialogue between both parties to resolve the dispute peacefully.⁴⁴

Meanwhile, the IACHR responded to the request for provisional measures by issuing a recommendation to the government of Chile, urging the State to immediately refrain from use of violence and performance of evictions.⁴⁵ Chile was asked to inform the Commission of measures taken to end violence within a period of ten days. Following orders, Chile reported back to the IACHR, informing them that under no circumstances had their actions violated any fundamental rights of the Rapa Nui and they defended the use of force by the police, who had, in their opinion, reacted adequately to the refusal of the occupants to leave the premises and claimed they had no choice, as the occupants initiated the violence against them.⁴⁶

2.1.2. The Hito Rangí clan

One particular story of Rapa Nui occupants was that of the Hito Rangí clan, who participated in the particular occupation of *Hotel Hanga Roa*, and it was no coincidence that they had chosen this particular hotel to occupy. The Hito Rangí clan formed an exception to the public hearings against the occupants, as their case involved a particular clash not only between indigenous peoples and the government, but also a third private party.

When the occupations started at the end of 2010, this third party -the Sociedad Hotelera Interamericana, owner of the Hotel Hanga Roa- filed an appeal before the Court of Valparaíso, requesting the eviction of the Hito family from their property. Both the court of appeals of Valparaíso and the Supreme Court however, dismissed the request of the Sociedad Hotelera Interamericana. Although the particular case included civil allegations, it was also still part of the criminal cases against the Rapa Nui. This held that a separate case would have to include a background check and discuss matters that require a statement from the political authority on the status of indigenous claims to territory.⁴⁷

Instead, on the 18th of February 2011 the government offered to settle the conflict between the Sociedad Hotelera Interamericana and the Hito clan: “the government would provide for transfer of the property, including the territory and the resort/hotel (worth \$40 million) from the Sociedad Hotelera Interamericana to the foundation of the Rapa Nui community. In exchange for this gesture, the manager of the hotel would be able to maintain the right to continue business on the land through the right of beneficial interest for a period of thirty years”.⁴⁸

The Sociedad Hotelera Interamericana applauded the government for its efforts of “generosity and patriotism” and agreed to the deal.⁴⁹ The Hito family sent a written statement to the government officials handling the case, in which they questioned the arrangement, emphasizing that these lands were illegally sold by the state to the Sociedad in the first place (under violation of the *Ley de Pascua*). They also expressed the feeling that the government seemed to provide themselves with the right to decide the terms and conditions of the deal, not consulting with the Hito family prior to its offer concerning which concessions were to be made and who will benefit from the profits made off the land, irrespectively of

⁴³ Rivas, p.199

⁴⁴ Rivas, p.200

⁴⁵ Pueblo Indígena Rapa Nui, Inter-Am. C.H.R. Report MC 321/10 (*provisional measures*), accessed July 30 2013, at <<http://www.oas.org/es/cidh/indigenas/proteccion/cautelares.asp>>

⁴⁶ Rivas, p.201

⁴⁷ Rivas, p.198

⁴⁸ Rivas, p.201-202

⁴⁹ Rivas, p.201-202

whom is given the title of ownership. Together with this an alternative was requested for the state to, based upon the power given to them under the *Ley Indígena* (art. 12), expropriate the land from the private investors and return the lands to their rightful owners, the Hito Rangi. For them it remained fundamental that an agreement respect the right to self-determination and ancestral territorial rights, not colonial supremacy.⁵⁰

2.2. Merits of the case

The agreement fell through as it was assumed 'implausible' by the government. At the same time a member of the Hito Clan, *Diana Eliana Hito Hito* took matters into her own hands and filed an individual civil proceeding against the Sociedad Hotelera Interamericana. She pled for restitution of the ancestral territory, as her family had done in response to the government bargaining offer. Hotel Hanga Roa stands on a piece of land, sold by the state to its current owners, the Sociedad Hotelera Interamericana S.A. a company belonging to the Schiess family (Germany). According to Diana and her family, this transfer was made without consent of the *Hito Rangi Clan*, because they had supposedly owned the property before the transfer. According to the government the property was legally transferred to the Sociedad, who allocated the treasury of Chile as its former rightful owner. The case before the Court in first instance and appeals rejected the request for restitution of the territory to the Hito clan, and the Supreme Court confirmed these judgments on May 25th 2012. The merits of the case will explain how the judicial apparatus came to this conclusion.

2.2.1. Argumentation of the applicant

As mentioned, Eliana Hito Hito is the applicant of the case. She is the daughter of Ana Hito Tepihe, who is the daughter of Maria Mere Hito Tepihe (Eliana's grandmother), the "rightful" owner of the territory. Ana and her brothers Ricardo Hito Tepihe and Esteban Hito Tepihe were heirs to the territory owned by Maria Hito under the inheritance title of the domestic *Codigo Civil*. Eliana demands restitution of the property to her family on the following grounds.⁵¹

The property was registered by the *subdelegación Marítima de Isla de Pascua* between 1926 and 1947 as a *posesión provisoria*. This is a title of temporary ownership/property holder rather than full ownership and was issued to many Rapa Nui at the time, giving them back their land yet phrasing the title in a way that the government treasury always remained in effective control. The territory marked 9 acres, 84m² and boundaries ran between Mr. Vicente Pont and the treasury south of the territory, with Mr. Andrés Chávez in the north, with Mr. León Laharua in the east and with the sea in the west.

The property was inherited by the children of Maria Hito Tepihe after she passed away but was said to have been transferred by *Veronica Atamu Pakomio*, widow of Ricardo Hito Tepihe (uncle of Eliana), after his death, to a company called CORFO on January 6th 1970, with reservations of 3,3 acres by Mrs. Atamu for her and her children. The contract under which the territory was transferred affirms that Mrs. Atamu was competent to sign the agreement. On the contrary, facts show she was illiterate (like most Rapa Nui of her generation) and her signature was marked by her initials in capital letters, suggesting she did not sign herself. If this is true it would make the contract foul, and thus legally null & void.

This was not recognized at the time and after the 'legal' transfer CORFO built Hotel Hanga Roa on the remaining 6.7 acres with permission from the State (who had remained in effective control of the property). On January 27th 1981 CORFO transferred the territory to Hugo Salas Roman (not originally Chilean) which was later registered to the property registry of the island. The Hito's claim however, that if the transfer to CORFO is null & void this transfer must be null & void too, thus the property would officially still belong to the heir of Ricardo Hito Tepihe and his wife Veronica Atamu Pakomio.

⁵⁰ Rivas, p.202

⁵¹ HITO primera instancia, p.1-5

Besides that the transfer would not be possible if the land is marked as ancestral. According to art. 13 *Ley Indígena* indigenous land titles cannot be “acquired through prescription” unless the acquiring party is of the same indigenous ethnicity. The owner after CORFO, Mr. Román was a Chilean, but had no Rapa Nui background. Furthermore it is stressed that reference to their family inheritance property title cannot only be found in the Civil Code but also in their indigenous status in the *Ley Indígena* art. 1 (definition of indigenous peoples) and chapter II (recognition, protection and development of indigenous territories); art 12 (application of definition of indigenous lands) and art. 69 (3) (retrospective application of the law). In this the applicant finds violations of articles 889, 890, 892, 893, 895, 702(1) and 728 *Código Civil* and fundamental principles of *Decreto Ley 2885*, *Ley de Pascua No. 16.441* and *Ley Indígena No. 19.253*

2.2.2. Argumentation of the defendant

The defendant, Sociedad Hotelera Interamericana, contradicts the applicant’s arguments on the following grounds.⁵²

Firstly, the acquired territory was registered to the Sociedad Hotelera Interamericana in the property Registry of the *Conservador de Bienes Raíces de Isla de Pascua* in 1991, in which the assumption of property is protected in art. 700 *Código Civil*. They also counter the argument that any provision under the *Ley Indígena* applies to the case, supplemented with a certificate of the CONADI which states the property on which the Hotel Hanga Roa stands is not indigenous territory because it was never registered as such, a compulsory requirement under art. 15 of the *Ley Indígena*.

The defendant therefore argues that this fact alone leads to the conclusion that this claim is meaningless and cannot be accepted by the Court. In their opinion this territory is subject to ordinary law and the procedure must be analyzed from that perspective only. The territory formerly was never their property, but a mere *titulo provisorio*, granting a temporary title to the family. A right of use of a terrain rather than a right transferred into an official title of ownership. Furthermore, the transfer of the territory between Veronica Atamu Pakomio and CORFO is not null & void, as the claim that she was illiterate is based only in the testimony of the applicant, who did not mention that her son, Isidro Ricardo Hito Atán (who supposedly was literate) also signed the contract confirming his mother knew what she was doing.

2.3. Final Decision

On the 25th of May 2012, in a unanimous vote, the Ministers of the fourth Chamber of the Supreme Court (Patricio Valdes, Gabriele Perez, Rosa Egnem, Juan Escobar and attorney Virginia Halpem) **rejected** the appeal of Diana Eliana Hito Hito against the current owners of Hotel Hanga Roa.

The Court held that “there was no violation of law” and the Sociedad Hotelera Interamericana has therefor legally acquired ownership of the territory, leaving the Hito family with no consistent claim. This was a confirmation of the decisions of the Court of Easter Island in first instance and the Appeals Chamber of Valparaíso, dismissing the request of the Hito family to claim (re)possession of the property.

2.3.1. Reasoning of the Judiciary

To address the demand of property and repossession, the Court starts its assessment at the very beginning of the acquisition of Te Pito o Te Henua in 1888. Here it recognizes explicitly that the Treasury of Chile gained possession of the entire island when marine Policarpo Toro Hurtado and Atame Tekena signed the annexation agreement on September 9th 1888. Exercising his right on behalf of the Chilean government, Policarpo transferred sovereignty of Te Pito o Te Henua to Chile. Due to this transfer, persons who lived on the island before the annexation became ‘illegal occupants of the islands territories’.⁵³

⁵² HITO primera instancia, p.7-15

⁵³ HITO Corte Suprema, Consideration 2(b), p.5

This adds up to *Ley 3.220* established in 1917 to enforce effective governance of the island to the Directorate of the Navy of Valparaíso. In 1928 this Directorate gave a *titulo provisario* over a piece of land of 9.8 acres to Maria Hito Tepihe, granting her the enjoyment and usufruct of the territory only. Via a Court judgment of the Civil Court in Valparaíso, the *Conservador de Bienes Raíces* upheld registry of the island territories to the State Treasury, this was maintained legal through the provision of art. 590 of the *Código Civil*.⁵⁴ Chile had the authority to act the way it did at the time. Under no condition could the entitlement of a *titulo provisario* have granted her ownership, nor was ownership inherited by her children or grandchildren.

In 1970 landlord Veronica Atamu (widow of former landlord Ricardo Hito Tepihe) transferred the *derechos eventuales/titulos provisorios* (temporary rights) of the territory once entitled to Maria Hito Tepihe to CORFO. The contract was signed together with her son Isidro Hito, before and with permission of the Chief of Staff of the Island (Pedro Villagra). Under the presumption that at least one of them could read and write, the transfer was confirmed.⁵⁵ In October of that same year, the treasury donated the territory, in a public subscription, to CORFO (*Corporación de Fomento de la Producción*), with the intention to have CORFO build a hotel on the premises. This donation was granted in form of a *titulo gratuito* which legally granted CORFO official full ownership over the property.⁵⁶

In 1979 the *Decreto Ley 2.885* was brought into force, a legal document which mainly initiated a regulation process of territory entitlement for the island's inhabitants (not distinguishing between Rapa Nui and others) living on the island yet not owning the territory. On the 2nd of January 1981 CORFO sold the Hotel and its premises to Hugo Salas Román, who according to the Court was from Chilean, but not from *Pascua* origin. The objection of the applicant that Román illegally obtained ownership from CORFO in light of art. 13 *Ley Indígena* was rejected by the mere fact that the territory was not recognized by the Court or the CONADI as indigenous territory as defined under art. 12 in conjunction with art. 15 of the *ley Indígena*.

If the territory would be indigenous the State would have had to grant Maria Hito Tepihe a *titulo gratuito* (art. 12(4)) which brings forward ownership, subsequently the property should have been registered under her name. This was not done because she never obtained ownership under her entitlement of *titulo provisario* nor was the territory ever demarcated as indigenous land. All this was confirmed by the CONADI, the organization responsible for filing registrations of indigenous lands in a special registry. The CONADI testified before the Court to never have registered the particular property to this registry.⁵⁷

When Mr. Salas Román became partner to the Sociedad Hotelera Interamericana Chile S.A. in 1991 he granted the company the hotel and premises and registered the judicial act once again with the *Conservador de Bienes Raíces* of Easter Island.⁵⁸

The *ley Indígena* was established in 1993 and provides for special norms which contribute to the protection, promotion and development of all indigenous communities in Chile. The law applies to and recognizes the Rapa Nui as a distinct indigenous community. According to all conclusions made above, this does not change the fact that the Sociedad Hotelera Interamericana obtained legal ownership of the Hotel Hanga Roa and its premises.⁵⁹ The territory is never demarcated as ancestral/indigenous and thus this law cannot be provoked. In this light the Court could not establish, on the basis of ordinary (Chilean) civil law that the applicant obtained effective possession through inheritance, of her mother Ana or grandmother Maria because the rights her grandmother obtained under the *titulo provisario* in 1928 were only those of usufruct and enjoyment (not possession or ownership) and these rights ceased to exist when the property was transferred to CORFO in 1970 by Veronica Atamu.

⁵⁴ HITO Corte Suprema, Consideration 2(e), p.5

⁵⁵ HITO Corte Suprema, Consideration 2(f), p.6

⁵⁶ HITO Corte Suprema, Consideration 2(i), p.6

⁵⁷ HITO Corte Suprema, Consideration 2(m), p.5

⁵⁸ HITO Corte Suprema, Consideration 2(j), p.6

⁵⁹ HITO Corte Suprema, Consideration 3, p.7

2.4. Conclusion

The conclusions of all three judgments revolve around obtainment of the territory by the Hito family through either *titulos provisarios* or the law of inheritance under the *Codigo Civil*, domestic property laws. It seems that whether presumed or proved, Veronica Atamu was conscious of her decision to transfer the land to CORFO, and this action is defined as the moment their right to the land ceased to exist. Furthermore, the existence of the *titulo provisorio* never entitled them to formal ownership, as understood in the Chilean *Codigo Civil* or *Ley 3.220*. Looking purely at the domestic legal system for the obtainment and loss of property the considerations made by the judiciary make sense. If Veronica Atamu was granted a title of usufruct and there is no reason to believe she lost this title to CORFO illegally, the law protects the current private owner of the territory.

What is odd however is that the judiciary chose to dismiss any claim to the territory as indigenous and certainly concerning its argumentation why. The *Ley Indígena*, the only domestic law for protection of indigenous peoples' rights is found to be non-applicable in this case on the ground that the land has never been registered as indigenous territory by the defendant, nor has it ever been demarcated as such by governmental authorities (the CONADI) when indigenous peoples' rights were installed. What the reasoning had been of the Chilean government to not demarcate the entire island as indigenous is not elaborated upon in the decision. Indigenous entitlement was simply not possible under the *titulo provisorio*, but the Court fails to discuss beyond this, as it was a governmental decision to grant her a title which prevented her from subscribing the territory as indigenous in the first place.

As a consequence it does not elaborate on possible application of indigenous rights in favor of the defendant in this particular case. All this is based on the single argument that Chile, according to the Court, had obtained full and permanent sovereignty, possession and effective control over the entire island when the *acuerdo de voluntades* was signed in 1888. It thus interpreted this document had permanently disabled any indigenous individual to gain indigenous property rights if the Chilean domestic legal system does not allow this.

The immediate legal consequences for the Rapa Nui with regard to the judgment in this case are primarily that with respect to obtainment or loss of territory, the domestic overarching property system prevails and determines the legality of transfer of property. That a certain transfer could be obtained under false pretenses must obviously be proven, and without proof beyond reasonable doubt a transfer cannot be reversed. What is more is that this judgment dismisses any claim of indigenous property, which can essentially have effect beyond the domestic legal system, if the domestic legal system has not allowed for it. If the demarcation of indigenous territory, performed by the Chilean government and the CONADI (ordered by the *ley indígena*) does not include territory disputed it can, per definition not be protected by indigenous laws.

This means the Chilean legal system is built in a way that indigenous peoples' rights are governed exclusively by the domestic legal system by virtue of the acquisition of sovereignty over the territory by Chile in 1888. Not even to mention that this implies a single interpretation is given to the document, with disregard of documented conflicting opinions on its content. The question which then arises in any international lawyer's mind is whether this violates Chile's commitment to international law on indigenous peoples' rights?

3. International legal framework on Indigenous Peoples: United Nations and International Labor Organization

Today the term indigenous refers broadly to living descendants of pre-invasion inhabitants of lands, now dominated by others. Indigenous peoples are culturally distinct groups that find themselves engulfed by settler societies born of the force of mainly European empire and conquest. "They are indigenous because their ancestral roots are embedded in the lands in which they live, much more deeply than the roots of more powerful sectors of society living on the same lands", Anaya Special Rapporteur on the Rights of Indigenous Peoples.⁶⁰ This is generally speaking the focal point of international law on indigenous peoples, which the Chilean judiciary in *Hito* dismissed on domestic grounds and thus it is important to research what the international legal system entails, to determine to what extent Chile can ground its arguments within this system, particularly concerning the *Hito* case, and in general for indigenous peoples in Chile and elsewhere.

In the development of the recognition for indigenous peoples and their rights, three phases can be distinguished within the international arena. First there was the colonization era (varied around 1500-1900), the up rise of discovery of new land by western civilizations and the era in which many non-western territories were (violently) conquered by western nations seeking to expand their territory. Main incentive to stay in newly discovered territories was the economic prosperity it brought states (through trade of natural resources). Although discovery of new territory was continuous throughout the entire era, it could be divided into two waves of colonization. The first running from roughly 1500 to 1800 and the latter between 1800 and 1900. Significance for indigenous peoples in determining these two waves is that initially indigenous peoples were recognized as players in international law, but from the beginning of the nineteenth century recognition was completely rejected and merely subscribed to 'civilized states'.⁶¹ For the specific case the first wave of colonization signifies Chilean mainland being colonized by the Spanish Crown, while during the second wave of colonization Chile was a state player and colonized Easter Island. Over the course of this era different modes of acquisition were developed and used in order for colonizing states to obtain sovereignty and effective control of the newly discovered lands.

Second was the post WWII era (1945-1989) in which the first international treaties were made on indigenous peoples. This was the era of initial recognition of wrongdoings by colonial powers, but although international documents were made for their protection, the indigenous peoples themselves were not included in the process of decision making. In this era slow change came about to grant indigenous peoples, among others a more humane and equal standard of living compared to non-indigenous peoples and the era in which indigenous peoples themselves found renewed strength among each other to seek recognition and receive it by a new power, the international community.

Third is the post-Cold War era (1989-present) in which we find ourselves today. An era in which the international community has taken a more humanizing approach towards indigenous peoples and now involves them in international decision making processes concerning them. In this era the first forms of participation on the international, regional and national platforms have been accomplished. This does not mean that today indigenous peoples enjoy the same level of livelihood as most of the dominant population in indigenous inhabited nations, yet there has been significant progress in order to better their conditions globally.

3.1. Colonialism

The advent of European explorations and conquest brought on questions to the Western Hemisphere regarding the relationship between Europeans and indigenous peoples they encountered. Within the first wave of colonization, prominent European theorists of the sixteenth and seventeenth century initially questioned the legality of claims to the new world and of ensuing, often brutal, settlement patterns in the

⁶⁰ Anaya, p.3

⁶¹ Gilbert, p.20-21

name of natural law. Vitoria was an important theorist who dealt with the issue and was the first that held that Indians possessed certain original autonomous power and entitlements to land, which Europeans were bound to respect. Other great theorists like Grotius and Vattel also spent time in researching the place of indigenous peoples under international law and to a certain extent all viewed that indigenous communities could be actors of international legal agreements.⁶²

At the same time they set methodical grounds to validate acquired territory, legitimizing conquest through the argument of necessity to obtain authority in the native people's own benefit. Although natives might possess some standard of rationality and civilization, they failed to conform to the European form of civilization with which most theorists were familiar. All based the European models of political and social organization on dominant defining characteristics of exclusive territorial domain and hierarchical centralized authority, because they knew no other and believed these to be true forms of authority. Most indigenous communities however, at that time, were typically organized by tribal or kinship ties, having a decentralized political structure and shared spheres of territorial control.⁶³ In this context theoretical ground was found to justify discovery and conquest of the new world. The Spanish arrived in Chile in the sixteenth century and in 1541 under leadership of Pedro de Valdivia Chile was added to the territory of the Spanish Crown by conquest.

The nineteenth and early twentieth century convergence to a more positivist idea of law furthered the ensured law of nations, or as it was now called *international law*, making it an even stronger legitimizing force for colonial power rather than liberation of indigenous communities. Their dominance had grown over the globe, and large economic prosperity was guarded at all costs. International law, as deemed by the states themselves, was only to be concerned with the rights and duties of the state amongst each other and to uphold exclusive sovereignty with regard to internal matters.⁶⁴

3.1.1. Modes of acquisition

The community of nations, actors of international law, established a general consensus on the acquisition of so-called 'unknown territories'. This consensus was arranged to legitimize colonization and prevent disagreements and war between competing nation states over territories. Colonial rule could be effectuated through different modes of acquisition, where ultimately the nation state's intention is to incorporate the unknown territory to its own sovereign territory. Five distinct modes of legitimate acquisition have been determined. If acquisition did not fall under these categories state sovereignty could be rendered unlawful.⁶⁵

The first mode of acquisition, and the most common one, is occupation or conquest in which case the appropriation of territory by a state is not at the time subject to the sovereignty of any state. In principle this implied the discovering power conquered *terra nullius* (empty lands) or lands of which inhabitants were seen as inferior to colonial power.⁶⁶ Moreover the populations which were living in the area were categorized as uncivilized because they were not living under a state organized in a manner of the European states of that time. In order for occupation to be legitimized there were a few ground rules.⁶⁷

Firstly the territory which the particular nation wished to occupy could not be any territory already occupied by or under sovereignty of another nation. The territory must be *res nullius*, as already mentioned this was either empty land or land where uncivilized communities live. Secondly, the nation needed *animus domini*, the intention of the acquiring nation to establish sovereignty of a definite and permanent character over the territory. This could be tested by whether the nation had any intention of installing a governmental authority to exercise its sovereign rights. Thirdly and lastly, the *act of possession*

⁶² Gilbert, p. 44

⁶³ Anaya, p.22

⁶⁴ Anaya, p.26

⁶⁵ Jennings, p.6-7

⁶⁶ Anaya, p.33

⁶⁷ Uriarte, p.11

must be effective and clear. This was often done by means of a special ceremony or by signing a document or other act which concluded the acquisition.

The clear division between recognized ancestral inhabitants and savages was blurred during the second wave of colonization.⁶⁸ As the principle of *terra nullius* evolved indigenous peoples territorial rights were now completely rejected and the international community of states devaluated their status as subjects of law to the domestic level. This meant that the requirement of *terra nullius* in the case of conquest could ultimately always be proven.⁶⁹

The second mode of acquisition is cession, which implies the transfer of territorial sovereignty by one state to another. This is most often effectuated by a treaty of cession, expressing the agreement to transfer by both parties. In this case local inhabitants, in colonial times, had been recognized as (at least to a certain extent) civilized and therefore there was a clear need for discovering powers to come to an agreement together with this population, or its leaders, to be able to transfer the territory's sovereignty. Gilbert however, defines cession as a mode of extinguishment rather than acquisition of territory.⁷⁰ Although treaties were concluded in concession of both parties and promises were made by colonial powers to protect tribe ownership, it was ultimately proof for colonial powers of territorial ownership to the international community of states.

As we saw in the case of the shifting legal implications of the *acuerdo de voluntades* the second wave of colonization caused for complete devaluation of many cession treaties, legitimized under the principle of *uti possidetis* previously agreed indigenous territorial rights were rejected by denying the entire existence of indigenous claim over territory.⁷¹ Contracts that had previously been drafted between colonial powers and local Chiefs were qualified as treaties outside international law and no longer capable of creating rights or obligations.⁷²

The last three forms of acquisition are less relevant to this research as occupation and cession were the most common forms of acquisition in indigenous territories, but are equally important to understand as part of the framework. The third mode of acquisition is prescription. A form by which the title flows from effective possession of the territory over a continued and undisturbed period of time. Prescription creates the right to ownership, whilst at the same time extinguishing the right of ownership to the former power. The fourth mode is that of subjugation or conquest, thus through violent or military force obtaining possession of a certain territory. Last but not least there is accession or accretion, by which land and territorial shape is changed by the process of nature, an actual human deed is not necessarily required in this case.

3.1.2. Role of indigenous peoples

Ever since colonization, indigenous peoples (as described in chapter one regarding the Rapa Nui) have documented histories of resistance, demonstrating their conviction and determination to survive with their distinct sovereign identities. Because however broad the concept of sovereignty or acquisition might have been in theory, it was conditioned by basic prejudice to favor values behind European political and social organizations. Consensus was that by forming treaties, one party does not necessarily lose its sovereignty or independent status by placing itself under protection of another as long as it retains its power of self-governance, however, once this party had passed under the rule of another it could no longer be viewed as a state and thus does no longer come directly under the law of nations.⁷³

⁶⁸ Gilbert, p.2

⁶⁹ Gilbert, p.20-21

⁷⁰ Gilbert, p.42-43

⁷¹ Gilbert, p.21

⁷² Anaya, p.31

⁷³ Anaya, p.23

Although initially recognized as sovereigns by conquering state, and as witnesses between hundreds of treaties concluded, the settler populations grew more dominant over time and states became less and less inclined to recognize indigenous people's sovereignty or any form of independence. At the same time many indigenous groups had no choice but to adapt to constant changing circumstances in order to survive, although many were still able to maintain their distinct identity.⁷⁴

3.2. Post WWII era

It was not till after World War II that a wave of humanization struck society and caused international law and politics to engulf humanity in its discussions and thereby shift its priorities. In colonization and continued suffering of the legacy of histories of many people, the international system grew more concerned with its humanitarian segments as the entire world had felt vulnerable to the impact of WWII. In a post United Nations Charter world, colonial structures were regarded negatively for depriving people of self-government in favor of administration ultimately controlled by the powerful of colonizing states for their own benefit. All people were found to have the right to determine where they belong, rather than be labeled by others.

The end of World War II reformed international law and joined the revolutionary movement that fought colonialism where it continued to exist in its classical form, urging for self-government in its place. The decolonization prescriptions however still managed to bypass indigenous patterns of association and political ordering which had existed before conquest. Instead of taking notice of all different kinds of people, democracy was used to gather the overarching society beyond the (former) colonial power and the population of a colonial territory as an integral whole, irrespective of pre-colonial political and cultural patterns, was deemed the beneficiary unit of decolonization prescriptions.⁷⁵

The right to self-determination as a key UN principle, codified under art. 1(2) of the Charter, was (according to its member states) established for the insurance of self-governance and subsequently the creation of a new world, the world as we know it today. The era of decolonization mainly involved external self-determination in a sense that intercultural differences within newly existing borders could (still) only be protected internally in highly exceptional cases, and borders were demarcated in light of existing colonial border, rather than with regard to pre-colonial territorial divisions of indigenous and tribal communities. This motive was visible in for instance the UN General Assembly Resolution 1514 which called for "the necessity of bringing to speedy and unconditional end colonialism in all its manifestations" in which "all peoples have right to self-determination". Implying that a new destiny and political status apart from former colonial power is determined, with independence as the absolute end point to self-determination.

In Africa the argument to demarcate this way was that there were surely too many communities to provide all with a separate sovereign state and in South-America the same argument could apply to the numerous amounts of indigenous communities. Furthermore, South-America had divided itself a century ago and breaking up existing and functioning border would potentially only cause more turmoil. The problem for many indigenous communities was however, that after the division had been made, and a 'majority community' had been handed power, in most cases in Latin America these were descendants of the Spanish, which caused for little change. What happened internally was still determined to be of no concern to the international order, as these affairs now constituted internal affairs under sovereign control of the rulers of the nation state. State sovereignty was initially still highly valued and secured, even within a newly existing and overarching international community. Secession in any form had always been highly contested under international law, but fear of self-determination grew greater now as a threat to restored peace and finally obtained territorial integrity. Indigenous peoples' position before the law grew closer to that of its surrounding society, yet further away from their own, endangering their heritage.

⁷⁴ Dep. ECOSOC, p.1-2

⁷⁵ Anaya, p.53-54

3.2.1. The United Nations

Despite all concerns for indigenous peoples, the United Nation's legal framework that emerged after the two great wars has become a manifestation of, and an impetus for, the changing character and growing power of international law and important change with regard to international law before the twentieth century. Although in both substantive and procedural aspects there remained elements of traditional state-centered frameworks, its institutions have proven to over course of time perform dynamically and adapt to change and provide new additional and specific legislation, also for the sake of indigenous communities. Despite that the sovereignty of UN member states is empowered and any claim of conflicting sovereignty on the part of non-member states is undermined, the UN has from the start actively promoted equal rights and self-determination of race, sex, language or religion and conditions for economic and social progress and development in its broadest sense.⁷⁶ Although states still remain in the position to determine most internal issue autonomously, the influence of the international arena is gradually gaining influence over internal issues which do not concur with the goals and principles set by, among others, the United Nations whose institution have grown more and more influential over the course of only a few decades. For indigenous peoples, the establishment of the UN has greatly evolved their rights under international law, but it must be bared in mind that the world is only at the start of this evolution.

3.2.2. The first Treaty on indigenous peoples

The new state of mind was changing and human rights based, yet sovereign nations remained to ascertain themselves the power to attribute certain guarantees and rights relating to internal communities like indigenous ones, without consulting them. Within the emerging human rights framework and parallel to the decolonization movement, the International Labor Organization (ILO) was the first to instigate the debate concerning the living conditions of indigenous and tribal peoples specifically through adoption of Convention No.107 in 1957. By identifying these workers as members of indigenous groups as in need of special measures for the protection of their human labor rights and being quite a radical text for its time, the onset of the Convention awoke an entire movement. Convention 107 was groundbreaking, but only in the time frame it was set. The premise of assimilation or integration operative among dominant political elements in national and international circles still overshadowed the Convention and its effects.⁷⁷

The Convention, although pleading for more humane treatment of indigenous peoples, promoted the assimilation or integration of member of culturally distinctive groups into the dominant political and social orders that engulfed them. Assimilation and rights of full citizenship were used to bring within the fold of self-government indigenous groups living in independent states. Cultural diversity was valued highly by the international community, but only to the extent that it existed among different states and colonial territories, not that it might exist within them. Trying to create and uphold unity within sovereign states, Convention 107 is framed in terms of members of indigenous peoples and their rights as equals within a larger society, disregarding completely their distinctive position and possible rights thereof.⁷⁸ Chile followed this trend when in 1966 the *ley Pascua* granted the Rapanui citizen rights, incorporating them as Chilean nationals and granting them equal rights and although the law was drafted with good intentions in mind, the government still refused to see the Rapanui as anything other than accepted Chilean citizens.

Over the course of decolonization after WWII and growing globalization, a great number of indigenous communities found themselves in a political sphere which still did not fully recognize their losses. Not undermining that at least because of the adoption of this particular Convention, the international community was willing to recognize indigenous peoples as people with rights. Making an effort to adapt to the overarching political and social sphere, placing indigenous peoples in a humane sphere for the first time in history. This however, was not enough to secure the survival of many indigenous communities and

⁷⁶ Anaya, p.51

⁷⁷ Xanthaki, p.51

⁷⁸ Anaya, p.54-55

protest slowly grew as the international community grew in influence and as indigenous peoples' representatives gained strength by joining forces.

3.2.3. Preliminary signs of indigenous up rise

The internal discontent with the international community's approach of ensuring rights for indigenous peoples, and preliminary signs of recognition in ILO Convention 107 initiated an enormous growth in indigenous peoples (non-governmental) organization at national and international level between the nineteen sixties and seventies and was the trigger for the advancement of specific indigenous peoples' rights as we know them today. In 1972 the emergence of a UN sub-committee on the prevention of discrimination and protection of minorities made way for their voice at the UN. The sub-committee recommended a more comprehensive study be made of problems of discrimination facing indigenous populations in particular.

José Martínez Cobo was appointed Special Rapporteur to the study, which was finalized between 1981 and 1984 and published in 1986. The study, better known today as the *Martinez Cobo study* covers a wide range of issues such as indigenous identity, culture, legal systems, health and medicine care, housing, education and language. It identified that despite various attempts to legalize equality, social conditions in which most indigenous populations lived were favorable to discrimination in various fields of study dealt with. It depicted the issue the indigenous peoples had now come to defend on the international level themselves. The most important aspect of the study was it being the first to define 'indigenous peoples', which is up and until today seen as one of the guiding definitions. Important for recognizing their distinctiveness to other peoples. It states:

*Indigenous communities, people and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as people [...]*⁷⁹

Never has an official permanent definition (this one included) been established for indigenous peoples and the question remains whether this would be desirable. Although a working definition has proven important to further their protection, the risk of narrowing down what an indigenous peoples is cannot come at the expense of the protection of any peoples. The study itself eventually led to the establishment of the first UN mechanism on indigenous issues, namely the Working Group on Indigenous Populations.⁸⁰

The working group would consist of five members who would serve as independent experts. In 1984 Chairman Irene Daes was appointed. The mandate of the Working Group consists of (a) the evolution of standards concerning indigenous peoples' rights and (b) the review of development pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples and submit conclusions and recommendations to the Sub-Commission on Minorities. In 1985 the UN installed a Voluntary Fund, established to assist representatives of indigenous peoples and involved organizations to attend working group sessions. Participation of indigenous peoples' representatives and their organizations marked the initial shift to the current international platform for indigenous peoples.⁸¹

Although Chile had been in a state of repression at beginning phases of indigenous recognition on the international level, and very little of what was discussed at the UN reached any indigenous community in the country, it was an important phase in international history and a newly built political basis on which the new democratic regime of 1990 could build quickly.

⁷⁹ Martínez Cobo Study, par. 379-382

⁸⁰ Publication series, Centre for Sami Studies, 'The United Nations and Indigenous Peoples from 1969 to 1994', accessed June 18 2013, at <<http://www.sami.uit.no/girji/n02/en/102daes.html>>

⁸¹ Dep. ECOSOC, p.2

3.3. Post-Cold War era

After indigenous peoples were granted participatory rights before the UN in the 1980s subsequent forms of participation on national, regional and other international platforms are made in a very quick tempo. The particular acknowledgement of the importance of land and resource rights evolves concurrently with the idea that indigenous peoples rights rely not only on equality and non-discrimination, but also distinctive and possibly preferential rights in comparison to other individuals because of their collective and distinct character. Initiating the end of an era in which indigenous peoples are regarded as subjects of international law, and the beginning of an era in which indigenous peoples become actors of international law.⁸²

In the case of Hito, the main focus lies in property rights. With regard to the special rights derived from international law for indigenous peoples, the right to land is evidently what many states feared, yet the developing international framework on indigenous peoples rights has proven that recognition of land is the fundamental basis for all indigenous cultures (this is why they stay where they are). Thereby implying an indigenous rights framework is useless without the right to land, property or territory, a huge step forward in the development of indigenous peoples' protection. Land and resources are of crucial importance to the survival of indigenous cultures and, by implication, to indigenous self-determination. It follows from "a general indigenous idea of communal stewardship over land and deeply felt spiritual and emotional nexus with the earth" and furthermore the security of land and natural resources to ensure economic viability and development of their communities that this right of immense importance.⁸³

Inherent to this movement and the basis for today's human rights framework on indigenous peoples are ILO Convention No.169 on indigenous and tribal peoples, adopted in 1989, and the adoption of the United Nations Declaration on the Rights Indigenous Peoples (UNDRIP) in 2007. Put together these documents offer a comprehensive protection of indigenous peoples' land rights, although some side notes are in order concerning the effectuation of this newly built framework.⁸⁴

3.3.1. ILO Convention No. 169 Indigenous and Tribal Peoples

The spirit of ILO Convention No. 169 is based on the notion of participation and consultation, the replacement of the former ILO Convention No. 107, representing a departure from assimilation and integration philosophies.⁸⁵ The core of the Conventional reform in light of the current movement concerning indigenous peoples. "In practice ILO 107 had become a concept which meant the extinction of ways of life which were different from the dominant society in a particular state" and the necessity of adopting an approach which takes account of the claims of indigenous populations had become more pressing to the core values of the ILO itself.⁸⁶

A first difference can be found in the adjustment of the title. While ILO 107 is entitled *Indigenous and Tribal Populations*, ILO 169 is entitled *Indigenous and Tribal Peoples*, where the term *peoples* gives a more collective and distinct feeling to the concept with regard to populations. Furthermore the policies of pluralism, self-sufficiency, self-management and ethno development were added to give these peoples the best possibilities and means of participating directly in the formulation and implementation of official policies deduced from the Convention.

The new incentive of the Convention is indicated in its preamble, recognizing "the aspirations of peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, language and religion within the framework of the States in which they live". It now includes provisions advancing cultural integrity, land and resource rights and non-discrimination,

⁸² Gilbert, p.293

⁸³ Anaya, p.141-142

⁸⁴ Gilbert, p.294

⁸⁵ Gilbert, p.195

⁸⁶ Report of the meeting of Experts, reprinted in part in *Partial Review of the Indigenous and Tribal Populations Convention, 1957 (No.107)*, Report 6(1), International Labor Conference, 75th Sess. At 100-18 (1988), par. 46

preserving the specific characteristics of indigenous communities while at the same time giving them the opportunities to form part of society at large. The one thing the Convention did not include was the recognition of self-determination, a strong term, which according to the ILO member states did not fit the scene. Meanwhile at the UN the discussion regarding self-determination did take place, resulting in its inclusion in the UNDRIP.

3.3.2. United Nations Declaration on the Rights of Indigenous Peoples

The UNDRIP was drafted to become the first official legal document by the United Nations concerning indigenous peoples. The drafting process of the Declaration took about twenty years and was done in cooperation with numerous representatives of indigenous communities all over the world, fitting the trend of the 1990's very well, but it was also because all parties were involved that the drafting process took so incredibly long. The fact that the indigenous representatives insisted on including the fundamental right to self-determination consequently caused delays.

Nation states have been and remain afraid of internal disruptions and care greatly for territorial integrity. That the Declaration when adopted included the right to self-determination for all indigenous peoples, portrays that it is a unique and valuable piece of legislation. The drafting process was much more integrated than that of ILO Convention 169 as indigenous peoples themselves were actively involved in drafting the text, rather than only with application of the document. Furthermore the preamble of the Declaration provides for historic awareness and an official apology of the wrongs done by many nation states, stating in its preamble to be "concerned that indigenous peoples have suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising in particular, their right to development in accordance with their own needs and interest".

The drafting process has also countered the continuing argument that indigenous groups aspire secession (externally self-determinate) from the nations they live in, but rather that they share the common wish to be able to live their lives without external interference, whether as an independent state or within a state. In order to gain this state of non-interference the Declaration intended and has succeeded in including the right to not only self-determination (art. 3 UNDRIP), but also autonomy and self-governance (artt. 3, 4 and 46(1) UNDRIP) with respect to political, economic, social and cultural issues. Concurrently the Declaration emphasizes the necessity the opportunity for indigenous groups to actively participate in national issues involving the same topics. In this relation the Declaration provides for the right to effective participation, real involvement and even further consultation and consent (artt. 10, 11, 19 UNDRIP) of the indigenous community when there are national issues that directly involve them.

The Declaration is however regarded as a part of general human rights legislation, and must thus be seen in conjunction with other human rights documents which can limit indigenous peoples rights in certain cases (as other human rights of individuals can also be subject to limitations). This way the Declaration tries to find a clear balance between integrating the indigenous communities in society, yet also respecting their distinct ways of life, both in order to preserve their cultures for many years to come.

The Convention and Declaration together have become a furthering manifestation of a movement towards responsiveness to indigenous people's demands while at the same time there remains a tension inherent to this movement. Indigenous peoples now stand up for themselves, demanding recognition of rights that are of a collective character. Both the ILO Convention 169 (art. 13) (and even ILO Convention 107 before it in art. 11) and the UNDRIP (art. 26) address the right to land for indigenous peoples as a distinct right for these groups. Both articles articulate the particular cultural and traditional value of land for indigenous communities to be the leading principle in protection by the state of these lands where at the same time they describe that this gives indigenous peoples the right to own, use, develop and control these lands as traditional owners of the territory. The articulation of these rights in a collective manner challenges the current system, and the notion of state sovereignty, especially in matters of social and political

organizations.⁸⁷ While the ILO Convention 169 is binding for all ILO member states, it specifies itself to the labor market and has only been ratified by a total of 20 countries since 1989. At the same time the UNDRIP is seen as a great source of inspiration for states, but its non-binding character poses problems with regard to enforcement mechanisms and implementation (although approximately 150 states have signed it). This does not directly lead to a system without redress as various UN Monitory mechanisms for human rights have found ways to add significantly to the effectuation of indigenous peoples rights through individual complaint procedures, but ideally it needs its own monitory mechanism to directly and consistently address the specific claims brought forward by indigenous peoples.

3.3.3. UN means of redress for indigenous peoples

3.3.3.1. UN Human Rights Council

The United Nations Human Rights Council (further: HRC) has been assigned the main and most well-known monitory mechanism of the UN, the HRC committee. It guards the effectuation and protection of the leading document on international Human Rights Law, the ICCPR. Although it has been addressing indigenous complaints since long before the adoption of the UNDRIP in 2007 in its own capacity, the monitory mechanisms approach seems predated in its visions on indigenous peoples' human rights protection. The HRC allows for an individual complaint procedure through art. 2 of the *(First) Optional Protocol to the International Covenant on Civil and Political Rights* (OP1 ICCPR) in conjunction with the rights laid out in the *International Covenant on Civil and Political Rights* (ICCPR). The rights laid out in the ICCPR are of a general and moreover individual nature, but a few are interpreted, because of their general nature, as an effective means of redress for specific indigenous peoples' human rights. In particular art. 27 ICCPR for the protection of ethnic, religious or linguistic minorities applied for the first time in the *Lubicon Band lake v. Canada* case of 1984.⁸⁸

The case was revolutionary for its time as before this case there had been no procedure or article in international law through which indigenous peoples could at all file an individual complaint. Through this judgment the HRC had found a way to incorporate indigenous claims into the ICCPR system by translating the collective nature of art. 1 (essentially the article which provides for self-determination for all peoples) to art. 27 of the Covenant under the notion of the phrase "enjoyment to own culture". In following procedures the Council managed to expand its line of reasoning to also include indigenous traditional and typical forms of economic life, often attached to land. Now, almost twenty years later the Council still holds on to art. 27, remarkably, because the issue of self-determination had supposedly been solved with the adoption of UNDRIP in which the right to self-determination for a collective was actively recognized.

The HRC however, holds that art. 1 ICCPR is, unlike art. 3 UNDRIP, is not equipped to deal with indigenous peoples rights as in general the ICCPR holds rights for individuals under the individual complaints procedure. The reason that it has managed to adhere to indigenous claims under art. 27 ICCPR is explained under General comment 23 in which it recognizes: "art. 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant".⁸⁹ Not a collective right, but a special individual right of a minority to enjoy a particular culture within the minority group. One in which the complainant has to be affected personally in order to enjoy protection of this procedure before the HRC.⁹⁰

The Committee finds art. 27 better equipped to deal with a more general complaint of the applicant which supports the idea of a particular way of life, associated with specific use of land and natural resources to secure their traditional way of life, unlike art. 1 ICCPR which is in a sense too broad. Although clever that it has been able to address indigenous claims this way in previous years, its reasoning no longer fits the

⁸⁷ Anaya, p.58-61

⁸⁸ *Lubicon Band Lake v. Canada*, Human Rights Committee, Communication No.167/1984

⁸⁹ *Poma Poma v. Peru*, Comm. 1457/2006 (HRC 2009), par.7.2, referring to General Comment No. 23, para.1

⁹⁰ Göcke, p.344

current sentiment of international indigenous peoples rights and stalled its opinion to that of the international community in the 1960's, integrating their rights into the existing system, rather than granting them rights with distinction for their uncommon situation. The arguments of the HRC for the procedure being purely individual simply no longer suffice the current sentiment concerning indigenous peoples. The case decision adheres to its classification of indigenous peoples as minorities, for whom article 27 ICCPR was set up, while most indigenous peoples do not see themselves as minorities, even if they generally fulfill all requirements attached to them.⁹¹

3.3.3.2. Other UN monitory mechanisms

Looking at indigenous peoples' rights today, no discussion under international law of their rights is even possible without touching upon the discussion of (internal) self-determination and all subsequent indigenous rights, including land rights are derived from this principle. Making its acceptance inevitable under the modern rubric of human rights and international law which has become increasingly concerning with upholding rights deemed to inhere in human beings, rather than in nation states.

The adoption of the UNDRIP, although non-binding, has brought significant and groundbreaking change to this narrow conception. As the HRC might be holding back, a number of other UN monitory mechanisms like the Committee on Elimination and Racial Discrimination (CERD), Committee on the Rights of the Child (CRC) and even the Committee on Economic, Social and Cultural Rights (ICESCR) have shown investments to becoming more open to establishing particular right for indigenous peoples which are guided by the wording of the Declaration.⁹²

Although both the CRC and ICESCR are not yet open to individual complaints procedures, the Committees have spoken publicly and loud to start referring to the UNDRIP to interpret their obligations under their own respective Covenants and to urge states obligations to be interpreted in light of the UNDRIP as well through state reporting documents. A trend that will hopefully be followed in the near future by the Human Rights Council.

3.4. Conclusions

This chapter has aimed at explaining that although international law once played the biggest role in the history of territorial dispossession it can now, today, be viewed as the biggest instrument in territorial repossession.⁹³ The fact that Chile has obligated itself to international law, and indigenous peoples law in particular, makes it an indispensable part of judiciary decisions concerning indigenous peoples.

For decades, international law has been a law created by nations, for nations. A system with complete disregard for individuals or those who could not be or were not identified as sovereign entities, with gruesome consequences. For indigenous peoples international law has long been the means through which their histories have grown into those of continuous violence and inhumane treatment, with destructive effects. Today it aims to undo its wrongs and calls actively for recognition of traditional territory. It grounded a new will to fight in indigenous communities, of which many had, despite everything, managed to endure time and struggles faced. It has proven to be a long and difficult journey to gain rights, but by coming together from all over the world, they have claimed their position on the international platform. The international system's contemporary treatment of indigenous peoples is the result of activity over the last few decades, acknowledged and accepted by states, but driven by the indigenous peoples themselves. With which they have now ceased to be the mere object of discussion of their rights and have become real participants in a relatively short period of time.⁹⁴

⁹¹ Göcke, p.339

⁹² Göcke, p.352

⁹³ Gilbert, p.xiii

⁹⁴ Anaya, p.56

In addition to their own effort the international United Nations system has produced various results to meet their demands. A new awareness of indigenous peoples' concerns and human rights has been raised, recognition of indigenous peoples' invaluable contribution to human cultural diversity and heritage has been highlighted and awareness of the need to address their issues through policies, legislation and budgets is constantly under the loop.⁹⁵

Nevertheless indigenous peoples' moral and formal victories from recognition in international law, actual effects of these developments are still slim. The real power remains vested in the hands of sovereign states, which can and do still too often ignore international norms in their own interests.⁹⁶ Most evident in the adoption of the UNDRIP. Notwithstanding inclusion of groundbreaking provisions on self-determination, land rights and redress for past injustices. The fight of indigenous peoples in not only the international arena, but even more so on a regional and national level is far from over, which makes it all the more important that the trend of realization is set forth in the future and all around to create a general consensus states cannot ignore any longer.

⁹⁵ Dep. ECOSOC, p.1-2

⁹⁶ Xanthaki, p.119

4. Regional legal framework on Indigenous Peoples: the Organization of American States

Just like the emergence of an international framework for the protection of indigenous peoples rights, there are a number of regional frameworks for the protection of indigenous peoples rights. Some would argue that the American regional system under which Chile falls, the Organization of American States (OAS), is the most advanced in its sort concerning exactly this issue.⁹⁷

The OAS is composed of all of the Americas and Caribbean states and came into being in 1948 with the signing of the Charter of the OAS in Bogotá, Colombia. The Charter, and with it binding cooperation, entered into force in December 1951. The organization was established in order to achieve “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence”.⁹⁸ Today the organization uses a four-pronged approach to effectively implement its essential purposes, based on its main pillars: democracy, human rights, security and development.⁹⁹ In order to better understand the work and initiatives taken by the OAS this chapter aims not only to explain the course of history and institutions of the OAS, but primarily commence with a “crash course” on Latin American statehood -although of course Canada and the United States are also part of the organization- in order to better comprehend the sphere within which the OAS, and ultimately Chile, functions.

4.1. From the Latin American Revolution to democracy

The history of most Latin American states, although there are obvious differences have been quite similar to one another. Before independence there were three main powers in Latin America. There was the Spanish Crown, which had ruled the continent for a long period of three centuries (with the exception of Brazil, conquered by the Portuguese) and alongside the Spanish Crown was the Catholic Church. Thirdly the continent is (still) known for its patriarchy (male ruled and dominated society). These three powers led the world with an inter-cultural and rigid hierarchical system. After the revolution against the Spanish crown, and fairly early independencies (around the beginning and mid-eighteen hundreds) the continent realized the revolution really had not put anything revolutionary in place. The power of both the Catholic Church and patriarchy grew bigger in the years thereafter, and the overarching powers of the states were mainly descendants of the Spanish conquerors.¹⁰⁰

Like in many other countries over the world, the borders that had been built by the Spanish remained standing, even though independence was gained. The rich and powerful took over and continued the destructive course the Spaniards had taken to gain even more power. In this context lands of indigenous communities were used and even taken over by the rulers as they pleased, relocating most of the indigenous communities over the entire continent to what we now understand to be ‘Indian reserves’. Policies of agrarian reform were installed, lowering the status of indigenous peoples to peasants in order to try and integrate them into society and undo possible entitlements to restitution of past violations. It left many indigenous peoples with no choice to rent land from the governments or move to wherever they ordered them to go in order to survive. These means of subordination and discrimination endured for over a decade until a wave of repression struck the continent. There are many theories as to why repression struck, but it was safe to say the Cold War and the division between capitalism and communism had everything to do with it. Unfortunately the outcome for Latin America was far from peaceful as a number of repressive military regimes took over. Opponents of the regimes were murdered, imprisoned or disappeared altogether and people lived in a state of fear. As for indigenous peoples this

⁹⁷ Mackay, p.16

⁹⁸ Art. 1 OAS Charter

⁹⁹ Organization of American States, ‘Who we are’, accessed June 22 2013, at http://www.oas.org/en/about/who_we_are.asp

¹⁰⁰ J. Green Crash Course World History #31, ‘Latin American Revolutions’, accessed June 22 2013, at <http://www.youtube.com/watch?v=ZBw35Ze3bg8>

was rarely a fairly peaceful time. The military regimes tended to leave them to their lands, and as far as they did not protest they were left in peace, although ultimately they gained nothing either.

The real change and up rise for and by indigenous peoples in Latin America did not come until the continent returned to democracy after the repressive regimes had been peacefully beaten. Since the late 1980's indigenous peoples participated in the return to democracy, not only to fight for freedom of all people, but in particular to fight for better living conditions for themselves. In the years that followed various platforms have been built challenging the historical image of 'Indians' as submissive, the big advantage of Latin American indigenous communities being that they represented significant percentages of the population (in Bolivia they are even in the majority).¹⁰¹ Reform was effectuated by the indigenous peoples, but not everywhere in the same manner. A number of states (Brazil) gave own initiative to formally acknowledge ancestral lands by ordering for demarcation of state territories. In some countries this meant constitutional reform, in other special laws were enacted, but essentially the majority of states found practical ways to still subject the demarcated territories to their control (Bolivia), or under their ownership (Chile and Brazil) afraid to lose territory. The continent's economy blossomed on export of natural resources, mainly extracted from lands now determined as being ancestral. Formal recognition had proven to contribute to acknowledgement of indigenous peoples, yet effectively their living conditions did not improve substantially. In some countries this led to renewed or continuing indigenous resistance (Chile) while in others the indigenous communities placed themselves in positions to be included on a political scale and win influence democratically.

In his lecture, Aylwin discusses a few case studies he conducted in different Latin American states to explain the implications of differently adjusted legal systems within Latin America to the acknowledgment of indigenous peoples' human rights, yet bring forward the main problems all indigenous peoples are confronted with in the region. Big difference is seen between countries with a high or low percentage in indigenous peoples, as those where indigenous peoples form a substantial part of society can gain more influence democratically. However, effectively all Latin American states seem to cope with conflicting governmental policies concerning indigenous peoples which continue to form part of the minority population. Although 15 out of 19 ratifications of ILO 169 are Latin American countries and all national legislation contains at least some law (either constitutional or not) recognizing indigenous peoples formally, ultimately there remains to be a lack of resources allocated to complete demarcation processes, transfer ownership titles and institutionalize effective control over those lands by the indigenous communities themselves. Different Latin American States have made reference to indigenous territorial rights in their renewed constitutions (dedicating some form of social function to the right to property), accepting and implementing the view of the Inter-American human rights system.¹⁰² Contrary to the fact that indigenous territorial rights have posed a major issue to the ability of states to use their sovereignty to build infrastructure freely, exploit licenses for exploitation and production of natural resources and other actions that may affect indigenous lands and use of their territory, which ultimately holds them back to full effectuation of indigenous protection. The impact of extractive and productive investments or large developments by the government bring continuous conflict between both parties as indigenous peoples are given the lands, as governments still chose to do what benefits them most, while indigenous communities beyond territorial rights lack consultation/consent privacies, participation benefits and compensation for damages caused.¹⁰³

The newly emerging conflicting policy of criminalization of protest by indigenous peoples in Chile (and also Mexico, Peru and Ecuador), in which the Hito family was also involved, has given cause for grave concerns among the international community and the Inter-American system, on whom indigenous

¹⁰¹ Yashar, p.23

¹⁰² Argentina, Brazil, Venezuela, Ecuador, Colombia, Paraguay, Guatemala, Panama, Nicaragua and Peru – see Gilbert, p.110

¹⁰³ J. Aylwin, lecture on '*Indigenous Peoples' land and resource rights in Latin America*', accessed June 22 2013, at <<http://www.youtube.com/watch?v=DTLrgFueFgQ>>

communities rely increasingly for enforcement of their human rights in a political sphere in which either their rights are not recognized, or there is not enough political will to enforce them correctly or sufficiently. The OAS' human rights systems, in cooperation with the UN Special Rapporteur on Indigenous Peoples' rights have been an enormous support system to signal arising disputes like these and make sure indigenous rights are respected.¹⁰⁴

4.2. The OAS and protection of indigenous peoples rights

The OAS, as mentioned in the introduction of the chapter was constructed only three years after the UN, but international relations between the American states had, by then, existed for over half a century. Main interest of states were inter-economic relations, but as the world developed so did the OAS and human rights soon became one of the spear principles of the organization. Furthermore the human rights defenders of the OAS evolved into the most advanced defenders of the specific human rights of indigenous peoples, a category of peoples found all throughout the Americas, sometimes even as majority populations. The most important bodies for the adherence of member states to respect and protect of human rights being the Inter-American Commission and Inter-American Court of human rights, in order to understand their role in the development of indigenous peoples rights the following parts of chapter four are devoted to them.

4.2.1. Supervisory systems

4.2.1.1. Inter-American Commission on Human Rights

The Inter-American Commission on human rights (IACHR) is the principle and autonomous organ of the OAS, whose mission is to promote and protect human rights in the Americas. It was created by the OAS in 1959 and became a permanent organ of the OAS in 1967 after amendments to the Charter. The formal beginnings of the Inter-American human rights system, which is compiled of the Commission together with the Inter-American Court on human rights (IACtHR) started with the approval of the *American Declaration on the Rights and Duties of Man* (ADHR), established together with the OAS Charter in 1948 and further elaborated and strengthened in 1969 with the adoption of the *American Convention on Human Rights* (ACHR).

The Commission's three main pillars are (a) the individual petition system, (b) monitoring human rights situations in the member states and (c) attention devoted to priority thematic issues. Furthermore the Commission "considers that inasmuch as the rights of all persons are to be protected, special attention must be devoted to those populations, communities and groups that have historically been targets of discrimination".¹⁰⁵ Against the background of the UN interest in racial discrimination and protection of minorities, and submissions of a number of petitions of alleging violations of indigenous human rights the IACHR began considering indigenous peoples rights since the early 1970's. Its growing workload and small staff forced the IACHR to adopt an ad hoc approach towards indigenous peoples until in 1989 it reacted to the passing of ILO Convention 169 with coordinated action and the start of drafting an American Declaration on the Rights of Indigenous Peoples.¹⁰⁶ The IACHR today, has various mechanisms designed to address indigenous peoples (and many other human rights') problems placing binding obligations on all OAS member states to comply with human rights standards.

First off are the country reports the IACHR issues, for which the Commission has developed a practice of issuing special reports on human rights situations in specific countries, not mandatory but on its own initiative. It gathers information from various sources -governments concerned or sends delegations to

¹⁰⁴ The conflict on Easter Island led to a communication of both the Special Rapporteur and the IACHR urging Chile to immediately cease any and all armed forces in its conflict with the Rapanui – see IACHR *defenders report*, par. 301

¹⁰⁵ Organization of American States, Official website Inter-American Commission on Human Rights, accessed June 22 2013, at <<http://www.oas.org/en/iachr/>>

¹⁰⁶ FPP and IWGIA guide, p.55 and 98

conduct on-site investigations- to compile a report. This report places states under significant levels of international scrutiny which can be increased by publicizing the final draft.¹⁰⁷

Specific interest in human rights of indigenous peoples started in particular in 1972 when it compiled a resolution entitled *Special protection for indigenous populations, action to combat racism and racial discrimination*. The report included that “for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of member states” and “to awaken in state officials an awareness of the rights of indigenous peoples”.¹⁰⁸ This resolution made way for reports to include specific information on the human rights situation of indigenous peoples.

The Commission may also investigate and make recommendations in response to specific complaints filed against any OAS member state, a procedure similar to that of the UN Human Rights Committee, yet broader in the sense that not only the victim of human rights violations, but also representatives of this person or non-government entities (legally recognized in an OAS member state) may file an individual complaint. Important is that when confronted by a complaint, the Commission must check to see whether the state is party to only the ADHR (all OAS states are automatically party to this Declaration) or whether they are also party to the ACHR (only if ratified separately), due to the binding character of the ACHR and the possibility to refer the case to the IACtHR in a later stage.¹⁰⁹

The Commission, after it has found a case admissible on procedural grounds, engages in fact finding by reviewing the parties’ initial written submission and usually by soliciting additional written information. It may also convene hearings or conduct on-site investigations if necessary, or assume the role of mediator at request of parties or upon own initiative.

Although the Commission has always found its mandate applicable to a broad case of individual and social rights, it initially did not find its instruments to include sufficient specific references to indigenous peoples, as neither the ACHR or the ADHR explicitly mention them. After the first couple of cases however, the Commission clearly found its way to consider and advance norms regarding indigenous land and other group rights.¹¹⁰ Practice of the Commission has shown the documents both include general human rights provisions which must also protect indigenous human rights. More specifically provisions which explicitly uphold the rights to property and physical wellbeing and implicitly affirm the right to integrity of culture have been applied specifically in the situation of indigenous peoples by the Commission.¹¹¹

Another important feature is that the Commission (and also the Court) have been granted the ability by the ADHR and ACHR to look into international instruments other than those adopted by the Inter-American system to support decisions and determine obligations of member states.¹¹²

In the meantime the Commission, together with the Court has been developing and applying a jurisprudence of indigenous rights that considers the Inter-American instruments to be integrated with the larger body of international law that concerns indigenous peoples.

4.2.1.2. The Inter-American Court

As mentioned, the 1969 adoption of the *American Convention on Human Rights*, which entered into force in 1978, created the Inter-American Court of Human Rights as an addition to the Inter-American human rights institution. Although the Court can provide binding provisional measures, it is a non-permanent institution where an individual has no legal standing. Only the Commission (or an OAS member state) is able to refer cases to the Court after it has concluded its own investigations and even that is only in cases

¹⁰⁷ Anaya, p.232

¹⁰⁸ Anaya, p.232 and FPP & IWGIA guide, p.54

¹⁰⁹ Anaya, p.159

¹¹⁰ Anaya, p.261

¹¹¹ Anaya & Williams, p.42

¹¹² FPP & IWGIA guide, p.29

in which the complaint is against an OAS member state that has ratified the ACHR and explicitly accepted the jurisdiction of the Court.¹¹³ The Commission has amended its Rules of Procedure in 2000 in order to establish a presumption in favor of submitting to the Court, those cases in which the Commission's recommendation(s) have not been followed.¹¹⁴

This said, it is logical that only a few cases so far have been adjudicated by the Commission to the Court, and only very few of these have been cases involving indigenous peoples. Looking at the caseload which the Court has dealt with however, it follows the Commission's lead in the advancement of a progressive application of the Inter-American instruments, taking into account contextual factors and a range of normative developments concerning indigenous peoples all over the world.¹¹⁵ The Court furthermore holds that all human rights treaties are living instruments whose interpretation must consider changes over time and present day conditions.¹¹⁶

Also, in general, a Court like the IACtHR only has jurisdiction *ratione temporis* which implies that alleged violations of human rights must have taken place during a time when the Court has jurisdiction over a state. This would pose a problem, because in many indigenous cases (especially on violations of land rights) human rights violations took place either before the ACHR entered into force or before the state in question accepted the jurisdiction of the IACtHR. As decided by the Court in the *Moiwana*⁽¹¹⁷⁾ case however, if the legal effects of a specific violation continue after jurisdiction *ratione temporis* has become effective, the Court may admit a case over the effects of those violations which took place before its jurisdiction *ratione temporis*, because these effects in themselves constitute violations of the ACHR.¹¹⁸ Thus with its limitations, the Court has made significant efforts to promote and protect indigenous rights where it did have the means and powers.

Nevertheless, formal recognition by both influential institutions of indigenous peoples is great improvement, but in itself not enough as progression in practice still remains far from coherent.¹¹⁹

The Commission does not have compulsory means to oblige member states to adhere to their recommendations. This while the Court is able to order (non)monetary relief or remedial measures (art. 63(1) ACHR) which has led to formal legislative reform, but leaves minimal signs of practical change. Despite these setbacks both institutions must be praised for their continuous interventions to continuously pressure member states to effectuate change, which has essentially already led to a huge change in mindset throughout the continent in only a decade.¹²⁰

4.2.1.3. The draft American Declaration on the Rights of Indigenous Peoples

One of the most ambitious plans so far was the installment of a working group to draft and implement an *American Declaration on the Rights of Indigenous Peoples*, devoted specifically and explicitly to improve human rights situations for indigenous peoples in the Americas.¹²¹ It creates moreover a symbol of American states' willingness to recognize indigenous rights, building a more specified framework to which the Human Rights Institutions can refer.¹²²

The proposal to draft the Declaration started in 1989. The Declaration would affirm the right to self-determination, rights to education, health, self-government, culture, lands, territories and natural

¹¹³ FPP & IWGIA guide, p.33

¹¹⁴ Anaya, p.266

¹¹⁵ Anaya, p.267

¹¹⁶ Pasqualucci, p.285

¹¹⁷ *Case of the Moiwana Community v. Suriname*, Serie C No. 124, Inter-American Court of Human Rights (IACtHR), 15 June 2005, par.43

¹¹⁸ Pasqualucci, p.291-292

¹¹⁹ Anaya, p.267

¹²⁰ Anaya, p.270

¹²¹ Indian Law Resource Center, 'Current situation on Draft American Declaration on the Rights of Indigenous Peoples', accessed July 19 2013, at <<http://www.indianlaw.org/projects/ihr/oas/draft>>

¹²² Anaya & Williams, p.35

resources, and include provisions that address the particular situation of indigenous peoples in the Americas.¹²³

The initial process was dominated by the OAS member states, which largely ignored the indigenous peoples' requests for regional consultation meetings and chose instead to consult with experts on the topic. Consequently, in its preliminary stages the developments of the Declaration were carried out without input from indigenous representatives. When in 1999 a working group was established to consider the Declaration, most OAS states maintained their position to adopt the Declaration behind closed doors and allow indigenous participation only at the opening and closing ceremonies, however a small group of states had decided to collaborate with indigenous representatives and allowed them even to occupy delegation seats in order to voice their opinions.¹²⁴ With this slight adjustment momentum was created for other indigenous groups to demand participation, which eventually led to a success.¹²⁵

Today, the Declaration's final revision is ongoing and the OAS is still working towards the endorsement of the document. Chile, along with Argentina, Brazil, Venezuela and Ecuador are the hardliners in the process and have created a block with the intention to substantially weaken the Draft Declaration. Their opposition lies mainly in those rights of great concern for the Rapa Nui, restitution of traditional indigenous territories and the installment of indigenous distinct legal institutions (proposed articles XII(2) and art. XX).¹²⁶ This leaves the current language of the Draft Declaration somewhere between that of the ILO Convention 169 and UNDRIP, lacking consistency and specificity while still aiming to contain a number of rights which, if interpreted expansively by the Inter-American human rights system, could still largely improve existing rights recognized in domestic legislation and IACHR jurisprudence.¹²⁷ While still no consensus has been found concerning the Declaration, the IACHR emphasizes that its current content should be understood to provide guiding principles for the Inter-American process in the area of indigenous rights, pursuing its mandate to protect human rights in the specific case of indigenous peoples.¹²⁸

4.2.2. Land rights and natural resources

Central among the demands of American indigenous peoples, and found in the draft Declaration, as well as in most cases before the Inter-American Commission and Court are the issues related to land, territories and natural resources, just like that of the Hito Rangi clan in Chile.¹²⁹ It remains one of the most controversial issues concerning indigenous peoples rights for opposing states like Chile.¹³⁰

That the legal system of the OAS is based on a classical civil law approach to ownership (art. 21 ACHR and XXIII ADHR) makes it technically non-compatible with the collective right to survival of an organized people, with control of their habitat as a necessary condition for the reproduction of their culture and development. Gilbert argues this argument has become a non-issue in the evolution of this right which now includes traditional collective ownership on the basis of equality and customary practices of international law.¹³¹ According to Gilbert it is evident from the emerging international instruments on indigenous peoples rights and its support found in various UN institutions and organs and Anaya adds the

¹²³ Indian Law Resource Center, 'The American Declaration on the Rights of Indigenous Peoples, accessed July 19 2013, at <<http://www.indianlaw.org/adrip/home>>

¹²⁴ FPP and IWGIA guide, p.98

¹²⁵ Indian Law Resource Center, 'Current situation on Draft American Declaration on the Rights of Indigenous Peoples', accessed July 19 2013, at <<http://www.indianlaw.org/projects/ihr/oas/draft>>

¹²⁶ FPP and IWGIA guide, p.106-112

¹²⁷ FPP and IWGIA guide, p.119

¹²⁸ FPP and IWGIA guide, p.26

¹²⁹ Anaya & Williams, p.35

¹³⁰ FPP and IWGIA guide, p.108

¹³¹ Gilbert, p. 101-114

Inter-American system itself has also put a lot of effort in a wide interpretation of current rights to property for indigenous peoples.¹³²

The beauty of the Inter-American human rights system for the protection of indigenous peoples rights and land, territory and resource rights in particular has been the way in which the Commission and the Court have made plausible how indigenous rights fit perfectly in the system.

Excluding indigenous property regimes from the property protected by the ACHR and ADHR would perpetuate the long history of discrimination against indigenous peoples, as the right to land, territories and resources does not only underline the economic and social survival of indigenous communities, but more deeply grounds in their spiritual and cultural beliefs which is what makes them distinct from others in the first place. Discriminatory application of the right to property because of a customary western interpretation would be “in tension with the principle of non-discrimination which is part of the Inter-American human rights system’s foundation” and thus cannot be condoned.¹³³ Non-discrimination clauses can also be found in the ACHR under art. 1(1) and under the ADHR under art. II.

Thus, the right to property in the Inter-American human rights system must be understood to attach to the property regimes that derive not only from a customary western interpretation, but also from indigenous peoples’ own customary or traditional systems of land tenure, independently of whatever property regimes derive from and are recognized by official states enactments, as there must be no hierarchy in application (in order to avoid discrimination).¹³⁴ What must be kept in mind is that the ACHR does allow general restrictions to the right of property under art. 21 ACHR to subordinate the use and enjoyment of property to the interest of society by states.

This restriction is only valid in case of it being (a) previously established by law, (b) necessary, (c) proportionate to restriction of the right to property and (d) with the aim of achieving a legitimate objective in a democratic society. Although restrictions in this form are acceptable (also in international legislation like the ICCPR and ICESCR), the Court in *Samaraka vs. Suriname* added a special additional imperative to this restriction in the case of indigenous peoples of whom it finds the position too weak otherwise, considering the restriction “may not result in the denial of indigenous customs or traditions so as to endanger their survival”.¹³⁵

Special attention is also given to those indigenous communities or peoples who have lost their homes and seek to return to them. Pasqualucci gives a critical remark of the capacity of the Inter-American System in effectuation of restitution of land rights.¹³⁶ As the FPP and IWGIA guide explains, this issue is one most debated and controversial among the American states.¹³⁷ In explanation of the *Sawhoyamaya v. Paraguay* and *Yakye Axa v. Paraguay* –leading cases on the subject– the Court states “members of indigenous communities that involuntarily lost possession of their lands, which have been legitimately transferred to innocent third parties, may have the right to recover them or alternately obtain other lands of equal size and quality”.¹³⁸

Nevertheless the Court does (have to) leave certain discretion to the state in question to identify the ancestral lands to be returned. States are given guidelines to take into account the possession of traditional territory which must be ineffaceably recorded in historical memory and the relationship with the land is such that severing that tie entails a certain risk of irreparable ethnic and cultural loss.¹³⁹ Furthermore it requests the state to make its final determination in consultation and participation with

¹³² Anaya & Williams, p.43

¹³³ Anaya & Williams, p.43

¹³⁴ Anaya & Williams, p.43

¹³⁵ *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172 (28 November 2007), par. 127

¹³⁶ Pasqualucci, p.70-73

¹³⁷ FPP & IWGIA guide, p.106-108

¹³⁸ *Sawhoyamaya v. Paraguay*, par. 128

¹³⁹ *Yakye Axa Indigenous Community. v. Paraguay*, p.215-216

the particular indigenous community. The Court acknowledges its fault in cases like these where it does not have the capacity, means or expertise to identify the indigenous lands itself and must therefore rely on states to do so. Unfortunately this still too often results in continued disappointment for indigenous peoples.¹⁴⁰

What additionally is kept in mind by the Inter-American Institutions, is essentially what makes application of “customary property regimes” so difficult: there is no universal or one-size-fits-all definition of indigenous property rights that it has been able to settle upon. Each indigenous community -as has been highlighted in trying to define them in general- possesses its own unique social, political and economic history and each has adapted and adopted methods of cultural survival and development suited to their unique environment and ecosystem inhabited by their community. Then again, one could also argue that all sovereign states also do not carry exactly the same system, and the only reason why this is deemed acceptable is because they are sovereign, and their systems are usually codified, unlike most indigenous systems which can only be retracted from speech or habit.

In essence however, like in sovereign states, a general trend can be identified as all groups’ particular systems of land tenure are recognizable as embodying a property rights regime. Extensive research has been done for instance in the United States where a number of native communities have established an advanced traditional judiciary system. What makes indigenous ownership primarily distinct from modern ownership is that the land is owned by the community or group as a whole, recognizing amongst one another individual property interests. Most do not conceptualize these property rights in exclusive terms, but rather as regimes of shared use and property rights even between different groups. It can be viewed as a less developed and more “familiar orientated” system than that of western civilizations (highly developed and completely individualized). Traditional land tenure can be understood as establishing a collective property of indigenous community and derivative rights among community members.¹⁴¹

Both internationally and regionally it has been established that the existence of indigenous property regimes must be seen completely independent of prior identification by the state and rather be discerned by objective evidence that includes indigenous peoples own accounts of traditional land and resource tenure like oral traditions and history or knowledge of the land and its resources.¹⁴² This in combination with the argument that not accepting this would constitute a discriminatory application of art. 21 ACHR or art. XXIII ADHR gives the Inter-American System a strong bargaining position and could be applied to various other indigenous peoples’ rights like self-identification, participation and education rights.

4.3. Conclusions

Bringing the history of the America’s and the development in indigenous peoples rights promotion and protection by the OAS together a troubled continent with little to no regard for indigenous peoples in the past, has come a long way with multiple constitutional and legislative reforms since the early 1990s. Showing its devotion for the fate of indigenous peoples the Inter-American human rights institutions, with disregard of the common consensus among their member states, have managed to set a precedent that is now being followed worldwide.

The international and regional norms that recognize rights based on indigenous peoples’ traditional landholdings and resource use are increasingly incorporated and reflected in the domestic legal practice of states throughout the American region and the world. Giving at least formal recognition to indigenous peoples’ communal rights in lands and natural resources based on traditional patterns of use and occupation. Throughout the Americas in particular, a great number of OAS member states have amended their constitutions or have adopted new laws to recognize and protect land and natural resource rights for indigenous peoples.

¹⁴⁰ Pasqualucci, p.73

¹⁴¹ Anaya & Williams, p.43-44

¹⁴² Anaya & Williams, p.46

Domestic legal developments have proven non-sufficient to protect indigenous peoples in the enjoyment of their lands and resource tenure. Concurrently these domestic legal advances remain far from fully implemented and translated into reality. Nonetheless, these developments signify a clear trend in the direction of the relevant international practice, and constitute legal obligations for state officials under domestic law, giving rise to expectations of conforming behavior on the part of the international community. At the very least, a sufficient pattern of common practice regarding indigenous peoples' land and resource rights exist among OAS member states to constitute customary international law at the regional level.¹⁴³

The aim of this chapter has thus been to portray the enormous additional value of the Inter-American human rights system to the international (UN) system. The Inter-American system and UN together bring forward the most comprehensive human rights protection framework for indigenous peoples the world has ever known. Despite the OAS member states usually obstructing recognition of collective rights at the international level, there is a strong legislative and jurisprudential evolution recognizing the nature of indigenous peoples' rights at all levels. The Inter-American Commission and Court having the most progressive and sophisticated discussion on the relationship of property and indigenous land rights, the basis for all indigenous protection.¹⁴⁴

The position of Chile is nevertheless a portrayal of the limiting capacity of both the Inter-American and international instruments and systems and the remaining capacity of state governments to essentially deal with indigenous issues as they see fit. In the case of *Hito* the Supreme Court decided indigenous land rights were no part of the issue and while authorized international institutions with increasing power may examine the problems faced by indigenous peoples and make relevant recommendations, a formally binding international judicial decision to counter state behavior in violation of international norms is a rare occurrence. Even the rare legally binding international decisions may yield compliance only with great difficulty as seen in the aftermath of most of the IACtHR's decisions. Despite its limited reach to provide actual change, an international procedure can promote the issue and shed light on problem situations that might otherwise go unnoticed by all but the indigenous peoples concerned.¹⁴⁵ The combined action of the IACHR and UN Special Rapporteur when the occupations of the Rapa Nui were forcefully ended have provided for enduring surveillance of the dispute and so far prevented further violent outbursts. The question is whether recommendations and surveillance or even an official complaint procedure before the IACHR with possible recognition of the lands as indigenous will actually give the Rapa Nui, and the Hito Rangī clan in particular, their lands back.

¹⁴³ Anaya & Williams, p.58-59

¹⁴⁴ Gilbert, p.114

¹⁴⁵ Anaya, p.270-271

5. Comparative case law

This chapter aims at comparing the developments in international, regional and national jurisprudence to the case of the Hito Rangi clan in order to value its place within the larger framework of indigenous peoples right protection and find the answer to the question whether a coherent jurisprudence can be found in coinciding conflicts.

From its earliest moments, international jurisprudence has invoked property precepts to affirm that indigenous peoples had original rights to the lands they used and occupied prior to contact with the encroaching settlers. The emerging recognition and affirmation of indigenous peoples' land rights at the international level are more and more reflected by gradual recognition at national levels as for instance in Latin American most Constitutions recognize some form of social function of the right to property.¹⁴⁶ Unfortunately it has somehow still developed too much without practically valuing indigenous cultures or recognizing the significance of their intrinsic relationship with the land.¹⁴⁷

Passage of time between how it was before settlement and how it is now has caused Courts to face problems with regard to judging on the existence of legal titles. A difference in values between indigenous and non-indigenous peoples is the core of the issue. Instead, judiciaries now often assume that land not formally registered belongs to the state.¹⁴⁸ Having endured rights to land on the basis of western traditional property with disregard of their own traditions now is the time and place to secure a broader approach, including non-western visions to property to effectuate the rights insinuated for indigenous peoples by the international legal system.

Fortunately an ever growing guide in jurisprudence is being built, trying to unify the consensual idea there now seems to exist among the international community, and effectuate constructive change in practice. A somewhat random selection is made of cases before national, regional or international judiciary. All of course having something in common with the *Hito* case, mainly for their (most recent) precedential character or specific similarities to the case.

5.1. Evolution of the jurisprudence on *terra nullius*

As described in the conclusion of chapter 2, the pressing reason for the Chilean Court to dismiss any account of traditional indigenous territory over the disputed lands was the extinguishment of these rights by effectuation of the *Acuerdo de Voluntades* in 1888, transferring complete and definite sovereignty of the entire island to the Chilean government, later transformed into the argument involving the principle of *terra nullius* installed by law. The evolution of jurisprudence on the concept of *terra nullius* sheds light on the possible interpretations of the transferal of territorial rights.

5.1.1. History of the *terra nullius* doctrine

In the history of its jurisprudence, the rise in positivist international law thinking changed prior forms of acknowledgement of indigenous land to extinguishment of indigenous land by legally denying their legal existence and thus the ability to define their territories as unoccupied lands.¹⁴⁹ Indigenous communities' rights to government were simply considered outside the competence of international law, which meant states did whatever they wished or pleased with 'indigenous' lands without any consequence.¹⁵⁰

With the rise of international laws of arbitration around the 1930's this trend was initially confirmed in competing sovereignty issues before arbitrary Courts. The concept of *terra nullius* was first addressed before an international legal body (an International arbiter) in the *Island of Palmas*⁽¹⁵¹⁾ case in 1928

¹⁴⁶ Gilbert, p.110-111

¹⁴⁷ Anaya, p.141-142

¹⁴⁸ Xanthaki, p.250-251

¹⁴⁹ Gilbert, p.21

¹⁵⁰ Anaya, p.29-30

¹⁵¹ *Island of Palmas Case*, (United States v. the Netherlands), Perm. Ct. Arb. 1928, II U.N. Rep. Intl. Arb. Awards, pp.829-871

between the Netherlands and the United States. Although it was advanced for its time, the tribunal reaffirmed that it did not recognize indigenous peoples as actors of international law, concluding that in “contracts between a state and native princes of Chiefs of people”, it could not recognize these Chiefs because they did not fall under the community of nations.¹⁵²

This was reaffirmed by the Permanent Court of Justice (of the League of Nations) in 1933 in the *Eastern Greenland*⁽¹⁵³⁾ case. It went so far as acknowledging that the Inuit indigenous peoples had been living in the area at time of settlement, but left it beyond consideration in the question whether Norway or Denmark had obtained sovereignty over the lands. Norway’s finding that the area had been *terra nullius* was trumped merely by finding Denmark had by then effectively established sovereignty, also recognized by others within the exclusive community of states.¹⁵⁴

It was not till 1975 that slowly this narrow conception of community of states started shifting. It was the International Court of Justice(ICJ) which in 1975 published an advisory opinion in the famous *Western Sahara* case, acknowledging for the first time that indigenous community settlement could certainly block the doctrine of *terra nullius* and occupation. It recognized that *terra nullius* had been erroneously and invalidly applied because indigenous tribes had inhabited the territory at the time of arrival of the settlers. Through this advisory opinion the ICJ endorsed the right to self-determination beyond that of western nations, for indigenous peoples. Although many states now claim lands had been *terra nullius* at the time of their arrival, most states at the time had obtained territory through agreements with locals, with regard to which the ICJ concluded that overall consensus had always been that indigenous inhabitants were not qualified as living on lands *terra nullius*.¹⁵⁵ Also in this case the ICJ concluded that Spain had not acquired sovereignty through occupation, but through the agreements it had made with local rulers (cession).

5.1.2. Mabo [2]

*“It is imperative in today’s world that the law should neither be or be seen as frozen in an age of racial discrimination and the fiction by which rights and interest of indigenous peoples in land were treated as non-existent were justified by a policy which has no place in contemporary law.”*¹⁵⁶

Although the *Mabo v. Queensland* case takes place on a different continent, its significant for affirming the gradual recognition of indigenous peoples right to land before a national court in a country which can historically be qualified as non-indigenous minded. The doctrine of *terra nullius* was completely rejected in both the national and international legislation in the case of indigenous inhabitation by the end of the 1990s in the famous case of *Mabo v. Queensland*. The case concerned a claim by the members of the Meriam people on the Murray Islands in the Torres Strait (off the Queensland Coast).

Although the ICJ in *Western Sahara* opened the doors to recognition of indigenous peoples on the international level, the High Court in *Mabo* went even further by concluding that even though the English Crown acquired sovereignty in 1879 over these islands, it must negatively answer the question whether by acquiring sovereignty the Crown became owner of all lands or whether it was burdened by any prior title (one which *terra nullius* supposedly extinguished). Ownership cannot be acquired by occupying land that was already occupied by another (rules of occupational acquisition) and even if sovereignty is gained it does not carry with it invariably the beneficial title to all lands of the acquired territory.¹⁵⁷ The High Court thereby reversed more than a century’s worth of Australian jurisprudence and official policy, recognizing officially the concept of *native title* ‘the right of property based on indigenous peoples’

¹⁵² *Island of Palmas Case*, (United States v. the Netherlands), Perm. Ct. Arb. 1928, II U.N. Rep. Intl. Arb. Awards, p.858

¹⁵³ *Legal status of Eastern Greenland* (Denmark v. Norway), 1933 P.C.I.J. (ser A/B), No. 53 (April 5)

¹⁵⁴ *Legal status of Eastern Greenland* (Denmark v. Norway), 1933 P.C.I.J. (ser A/B), No. 53 (April 5), par. 69 and 302

¹⁵⁵ *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, par. 80

¹⁵⁶ *Mabo and others v. Queensland* (No. 2) [1992] High Court of Australia 23; (1992) 175 CLR 1F.C. 92/014, par. 41

¹⁵⁷ Strelein, p.11

customary land tenure, characterizing the past failure of the Australian legal system as unjust and discriminatory.¹⁵⁸

Native title is the common law term for property/land rights and has thanks to this judgment been given a broadened content by including to it traditional indigenous custom observed of a territory.¹⁵⁹ The Australian High Court has however identified a number of requirements to be able to burden on a radical title of territory like that of the State, as it does not have the intention for native title to be interpreted without any limits. These requirements include that the existence of an identifiable community or group can be proven, that this group's traditional connection or occupation of land can be found under the laws or customs of this particular group (do not per se have to be exclusive), have existed prior to settlements and that substantial maintenance of this connection is still visible at this time.¹⁶⁰ The extent and content of native title which fits these requirements is further contentiously subject to the laws and customs of the peoples concerned.¹⁶¹ Native title can therefore be lost where the traditional connection with the land (physically or spiritually) has broken, has been surrendered or has become extinct.

The judgment has become a landmark case for recognition of indigenous rights all over the world.¹⁶² The similar ground breaking case of *Delgamuukw v. British Columbia* (¹⁶³) before the Canadian Supreme Court as well as the South African *Richtersveld*(¹⁶⁴) case exemplify this by judging similarly the inclusion and recognition of the independent concept of native title (with its limitations) as a collective proprietary right and its more encompassing nature than that of any regular proprietary right under Canadian law.¹⁶⁵

Significance for the Hito Rangī case

In light of the new trend set by the *Western Sahara* and *Mabo* case, this would imply a great deal for the *Hito* case. Firstly the conclusion of the Chilean Supreme Court, and ultimately where the entire conflict starts, that because of the *Acuerdo de Voluntades* the Treasury of Chile gained possession of the entire island.

Following the ICJ advisory opinion in the *Western Sahara* case it can be concluded that at the time of acquisition of Te Pito o Te Henua by Policarpo in 1888, the *Acuerdo de Voluntades* stands for literal recognition of the Rapa Nui as inhabitants of the island prior to settlement of Chile. The island could thus never have been acquired through occupation as its features clearly recognize the acquisitional mode of cession, being an agreement between the western nation state of Chile and the local ruler of the Rapa Nui, Tekena. Whether in fact Chile obtained full and unconditional sovereignty of the island through cession is a matter which the ICJ does not address in its opinion, but can be addressed by following jurisprudence.

If we follow *Mabo*, the acquisition of the island does not necessarily imply full and exclusive possession for the settling party in all cases. The requirements to burden the radical title by Chile would have to be backed up by proof of existence of an identifiable community or group, that this group's traditional connection or occupation of land can be found under the laws or customs of this particular group (do not per se have to be exclusive) and have existed prior to settlements and that substantial maintenance of this connection is still visible at this time. The Rapa Nui have been identified by Chilean legislation as an indigenous group (under the *ley Indígena*), they have been there since before settlements and they carry particular connections with the land in light of their ancestral beliefs. In this light a renewed discussion may take place regarding whether the act of cession through the *Acuerdo de Voluntades* of 1888

¹⁵⁸ Strelein, p.11-12

¹⁵⁹ Strelein, p.11-12

¹⁶⁰ Strelein, p.14

¹⁶¹ Strelein, p.15

¹⁶² Xanthaki, p.243-244

¹⁶³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

¹⁶⁴ *The Richtersveld Community and Others v. Alexkor Limited and the Government of South Africa*, Case No. 488/2001 (March 24 2003)

¹⁶⁵ Gilbert, p.111

transferred all and exclusive sovereignty to Chile, or whether current human rights values and legislation empower the Rapa Nui to regain effective control regarding their ancestral status. This could thus reopen the argumentation as to whether the treasury of Chile indeed legitimately obtained possession of the land, and which territory in particular (or not). What will also play a large role is the interpretation of the agreed annexation document. If custom cannot prove that both parties agreed to total transfer of sovereignty this will play a significant role in determining both parties' position of proprietary power today.

The evolving legislation also shows the change in mindset concerning historical and contemporary international legislation, concluding that although history may provide for legitimacy on the side of Chile, contemporary international rules can bring about change never intended by national legislation. Concurrently the judges in *Mabo* point out these historical rights which promote discrimination may never be legitimized within the individually oriented legal frameworks known today.

5.2. Hopu & Bessert v. France

The *Hopu & Bessert* case before the Human Rights Committee is strikingly similar to the case of the Hito Rangi clan on Easter Island. The complainants were two indigenous people from Tahiti (a French overseas territory), one named Hopu and the other Bessert, who claimed alleged violations of art. 2(1) and 3(a) respect for rights laid down in the ICCPR, art. 14 right to due process, art. 23(1) protection of the family and art. 27 the right to enjoy their own culture as a minority group.

These indigenous people are descendants of owners of a piece of land in Nuuroa on the island of Tahiti (also a Polynesian island). They were dispossessed of this land by order of the Court in 1961 when it was awarded to a corporation by the state of France. The indigenous family was displaced and their land was subsequently leased and sub-leased to two other companies in 1990. One of the companies intended to construct a luxury hotel complex on the premises and had begun clearing the land for construction. The complainants and others, in response, occupied the land in protest in 1992, maintaining "the land and the lagoon bordering it represented an important place in their history, their culture and their life."¹⁶⁶ This in particular because the territory encompasses the site of a pre-European burial ground and the lagoon remains a traditional fishing ground which provides for the means of subsistence of some thirty families living near the lagoon.

The company refused to adhere to their complaints and with a Court order that same year required them to vacate the area and pay compensation to the company, this was affirmed by the Court of Appeal in 1993. In response the indigenous owners brought the case before the HRC, after which France took measures into its own hands by sending a large number of police accompanied by military personnel to Tahiti to seize the territory and build a large fence around it.¹⁶⁷

Unfortunately comparison wise the HRC could not determine a violation on the grounds of art. 27 ICCPR because France had registered a reservation to the article. Upon acceding the Covenant France declared that "in the light of art. 2 of the Constitution of the French Republic art. 27 ICCPR is not applicable as far as the Republic is concerned".¹⁶⁸ The HRC did continue to evaluate possible violations of the other articles admitted. Although France disputed the argument by holding their claim had failed to establish a direct kinship link between the remains discovered in the burials and the indigenous peoples themselves, the HRC ruled in favor of Hopu and Bessert.

It indeed found violations of art. 23, holding that the land represents an important place in their history and constructing a hotel complex on that land would interfere heavily with their privacy and family life. Furthermore it decided that the kinship link could not be held against them as the burial grounds pre-

¹⁶⁶ *Hopu and Bessert v. France*, par. 2.3

¹⁶⁷ *Hopu and Bessert v. France*, par. 8.1

¹⁶⁸ *Hopu and Bessert v. France*, par. 4.7

dated the arrival of European settlers and are recognized as including the forebears of the present Polynesian inhabitants of Tahiti.¹⁶⁹ France on the other hand has not been able to convince the HRC of reasonable grounds for interference and under art. 2(3) ICCPR France is under the obligation to protect the authors' right effectively and to ensure that similar violations do not occur in the future.¹⁷⁰

It is interesting to see that even if a state has reservations concerning the one article the HRC deems fit for indigenous peoples rights, it has still managed to see the complaint through and grant the indigenous peoples a victory. Nevertheless violations of art. 17 and 23, the *Hopu & Bessert* case is perhaps even more interesting for what it does say about art. 27 and the guarantees it could have provided. At least nine members of the HRC believed art. 27 ICCPR was applicable in the particular case and if analyzed under this article it would have been very likely that destruction of ancestral property and attendant interference with the ability of the complainants to maintain their ancestral relationship would amount to denial of the right to enjoy culture accorded to members of minorities.¹⁷¹

Significance for the Hito Rangi case

With very similar facts to the *Hito* case, this case shows the inclination of the HRC to side with the indigenous community of the Hopu and Bessert family. It also shows the significant limitations of the HRC as an international and overarching institution of legal redress for individuals in only being able to consider indigenous land rights cases most effectively under art. 27 ICCPR.

The advantage of the Hito Rangi clan being that Chile does not have any reservations concerning article 27 and the HRC would be free to interpret the case on the basis of this article. Yet as acknowledged in chapter 3, the implications of art. 27 ICCPR do not include under any circumstance the right to self-determination under art. 1 ICCPR (as decided in the *Lubicon Band Lake v. Canada* case). An important factor to be taken into account for *Hito* as the main obstacle lies in the legislative power of the *Acuerdo de Voluntades*. It will be difficult to impossible for the HRC to decide on the legal status of the annexation agreement in light of art. 27 ICCPR. For the *Hopu & Bessert* case a violation of art. 27 ICCPR was added as the denial of the right to their own culture as a minority, where ultimately this article could only grant the Rapa Nui the right to enjoy their own culture, a right which has effectively been added to the Chilean *ley Indígena* under art. 7 and 8. The right to property is not mentioned explicitly in the ICCPR, which further complicates a defense strategy against the *Acuerdo de Voluntades* in light of the argumentation of the Chilean Supreme Court.

Further important factor to be kept in mind is the proof of significance of the territory disputed to the Rapa Nui spiritual and cultural beliefs, regarded as essential by the HRC for recognition of indigenous lands in the *Hopu & Bessert* case. Essentially the Hito Rangi's could argue the entire island is of significance to the survival of the Rapa Nui community, yet the particular piece of land under dispute lies in Hanga Roa, the property least inhabited by the community in ancient times, and only now the specific territory where many Rapa Nui have built their existence because of forceful migration to Hanga Roa by the Chilean government in the early twentieth century.

If this can however be proven, the HRC could significantly address the legality of the Chilean *ley Indígena* which is dominated by the will of the CONADI, a governmental agency, rather than based on indigenous minority culture.

5.3. Dann v. United States: extinguishing traditional ownership title

This case in particular arose from the refusal of the Western Shoshone (indigenous community) sisters Mary and Carry Dann to submit to the permit system imposed by the USA for grazing on large parts of the Western Shoshone traditional lands. Faced with efforts by the government to forcibly stop them from grazing cattle without a permit and imposing substantial fines for doing so anyway, the Dann sisters

¹⁶⁹ Forest Peoples Programme Report, p.30

¹⁷⁰ *Hopu and Bessert v. France*, par. 12

¹⁷¹ Forest Peoples Programme Report, p.31-32

brought the case before the Court, arguing the permit system contravened the land rights they owned under their indigenous property title. Its significance lies in the judgment that explores the relationship between extinguishable indigenous property titles and human rights.¹⁷²

The area of the Western Shoshone had once been ancestral lands when the USA signed the *Treaty of Ruby Valley* in 1863 with the Western Shoshone community, granting the USA rights to various uses of the land, but not its transfer of title.¹⁷³ On the contrary, the USA concedes that rights of ancestral ownership had extinguished through a series of administrative and judicial determinations made over time. The main argument being it now regards the lands as government property because the gradual encroachment by non-Indians no longer made the land exclusively ancestral.

The Western Shoshone community had all that time remained living in the area. Additionally the government had permitted large-scale gold mining and other environmentally damaging activities on the land without providing any means of compensation or shared profit to the Western Shoshone community.¹⁷⁴ The ICC, *Indian Claims Commission* is the administrative body created by Congress to determine compensation to be paid to Indian tribes who lose their lands. An earlier claim had been admitted to the ICC by the Te-Moak tribe with regard to the Western Shoshone. This claim was awarded 26 million dollars (approximately 15 cents per acre) by the ICC. This was highly unfortunate because according to the ICC Act, once a tribe is paid compensation it cannot make any further claims against the USA. The case went all the way to the Supreme Court which ruled only on the issue that they had been compensated and that their claim was thus barred by the ICC Act.

In response the Dann sisters took the case to the Inter-American Commission of Human Rights (the USA is not a party to the ACHR, nor has it accepted competence of the IACtHR). The Commission examined the case, considering why the Western Shoshone community, and the Dann sisters in particular had not had the adequate opportunity to be heard, denying them the same procedural and substantive protection generally available to all property holders under USA law.

In favor of the Western Shoshone community the Commission subsequently concluded the inadequacy of the historical rationale for the presumed taking of the land by the state, yet did not decide who effectively owned the land. It only found the USA guilty of violating the right to property, equality before the law and fair trial rights, guaranteed by its national laws. With it recognizing a direct discriminatory approach to legal protection of indigenous peoples, compared to non-indigenous peoples in similar cases.¹⁷⁵

The case led to the Inter-American Commission extending the interpretation of the right to property under the ADHR, emphasizing due process and equal protection prescriptions are to be attached to indigenous property interests in land and natural resources similar to regular property interests in land and natural resources. The significance of the decision lies in the endured possibility for indigenous peoples to seek redress outside the national system if it does not provide them with adequate protection. Furthermore, the reasoning of the Commission to declare it highly disputed that the USA can claim indigenous lands on the basis of a presumption of 'extinguishment' reaffirms the Inter-American legal vision concerning indigenous peoples that property regimes are derived from their own customary or traditional systems of land tenure, independently of whatever property regimes derive from and are recognized by official state enactments even if it did not explicitly decide who is the territory's current owner.¹⁷⁶

¹⁷² Gilbert, p.76

¹⁷³ Indian Law Resource Center Report, p.2-3

¹⁷⁴ Anaya & Williams, p.40

¹⁷⁵ Indian Law Resource Center Report, p.6

¹⁷⁶ Anaya & Williams, p.43

Significance for the Hito Rangi case

Seen in conjunction with the jurisprudence derived from *Mabo*, this would once again pose an area of dispute concerning the decision made by the Chilean government to dismiss any indigenous title. It shows that even if extinguishment had been conducted legally, its process should have been in conformity with fundamental guarantees of equality before law and should consider both the collective and individual nature of property rights and equally implies a right to fair compensation in the event that such property and user rights are irrevocably lost.¹⁷⁷

This could imply that even if the transfer under Chilean law legally effectuated extinguishment of the right to property by the Hito Rangi clan, this transfer would still have to comply with international human rights standards and guarantee equality of the decision before law with regard to other transfers made. This is also in complete conformity with the judgment of the Australian High Court in *Mabo* which ruled not only on conformity with international human rights standards, but also that these historic agreements do not necessarily amount to transferal under today's international law only because they did at the time of transfer.

Unfortunately the *Dann* case displays the weakness of the Inter-American system, which is implementation of decisions. So far the USA has refused to accept the Commission's findings, arguing the ICC decision ended the Western Shoshone land claims dispute regardless of fundamental unfairness of the situation. The IACHR's recommending powers hardly trump the political internal power of the USA. A factor which must be taken into account in any international trial regardless of the conclusions made.

5.4. Awas Tingni v Nicaragua: guarantee of indigenous communal lands

The *Awas Tingni v. Nicaragua* case is the landmark case of the IACtHR with regard to indigenous land rights in its entirety. The case originated with a petition to the IACHR alleging Nicaragua's failure to take measures necessary to secure the land rights of the Mayagna indigenous community of the Awas Tingni in the Atlantic coastline of Nicaragua. It was the first indigenous case ever to be heard by the Court, in which it clearly recognized that the traditional patterns of use and occupation of territory by indigenous peoples must be qualified under the right to property.¹⁷⁸

The merits of the case revolved around the efforts by the Mayagna and other indigenous communities in the region to demarcate their traditional lands and thereby prevent logging practices in the territories after the government granted a Korean logging company a license to initiate logging. The Commission ruled in favor of the indigenous communities in 1998 and recommended Nicaragua provide for appropriate remedial action. When Nicaragua failed to comply with the recommendations of the Commission it referred the case to the IACtHR, despite initial improvements of the government by implementing domestic constitutional and statutory provisions which then legally required the state to guarantee indigenous communal lands.¹⁷⁹

Significance of the case lies especially in the application of art. 21 ACHR, interpreted by the IACHR and IACtHR for the first time to include, besides individual property rights, also collective property rights. The Commission argued for such recognition in the light of customary international law and the Court acknowledged customary indigenous ownership had to be regarded as a property right, moving indigenous peoples to actors of international law.¹⁸⁰ That initially Nicaragua possessed no domestic legal remedies to counter the issue of the Awas Tingni communities was thus a non-issue since "the Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory [...] their rights exist even without State actions which specify

¹⁷⁷ *Marie and Carrie Dann v. United States of America*, par. 130 and 143

¹⁷⁸ Gilbert, p.101

¹⁷⁹ Anaya & Williams, p.38

¹⁸⁰ Gilbert, p.102

them [...] traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries.¹⁸¹

Furthermore the Inter-American system protects traditional lands on the basis that it requires states to delimit, demarcate and legally entitle traditional lands to indigenous communities. In this case it has provided the fundamental basis for indigenous land rights with due regard to indigenous special relationships with land, summing up the specifications required to confirm property in indigenous communities, with which it takes note that:

“among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community [...] indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”¹⁸²

Significance for the Hito Rangí case

In any piece on jurisprudence concerning indigenous peoples' land rights, the *Awás Tingni* case is mentioned, it is the case that has proven the commitment of the Inter-American system to the promotion and protection of indigenous peoples' rights. For the *Hito* case, reference can be made to the *Awás Tingni* case of the duty of the state to delimit, demarcate and legally entitle traditional lands to indigenous communities. Indigenous peoples, by the fact of their very existence, have the right to live freely in their own territory.

When examining the *Ley Indígena* 19.253 art. 12 (1) mainly describes indigenous defined lands as those granted by titles of Chilean domestic laws or under art. 12 (2) those territories which have historically been occupied by the Rapa Nui people or community. All indigenous territories are registered in the *Registro Público de Tierras Indígenas*, created by art. 15 of the *ley Indígena*. The CONADI, as mentioned in chapter one has the right to deny registration of indigenous property and only property that has been registered enjoys the legal benefits of indigenous territory.¹⁸³ Under the ACHR art. 21 the decision by the IACtHR in the *Awás Tingni* case reads that a member state's failure to comply with the right to property concerning indigenous peoples violates their obligations under art. 2 ACHR. This article obliges them to adopt, in accordance with their constitutional processes and provisions of the Convention such legislative or other measures as may be necessary to give effect to the rights under art. 21 ACHR. Only in the exceptional case that a governmental decision would be in the interest of society may it make a decision not in the interest of indigenous peoples. The question whether not demarcating the lands in Hanga Roa as indigenous could provide a violation of art. 2 if the Chilean government cannot supplement this with sufficient proof of necessity in societal interest.

On the basis of the decision by the IACtHR in *Awás Tingni* a closer look could thus be taken at the legitimacy of the *Ley Indígena* concerning the free right of indigenous communities to determine indigenous territories in light of the provisions of the Convention, rather than it being the right of the state to determine the territories as such (which goes beyond the essence of defining territories as indigenous). Obviously the Rapa Nui will have to prove their close ties with the grounds for the fundamental basis of

¹⁸¹ *Mayagna Awás Tingni v. Nicaragua*, par. 140

¹⁸² *Mayagna Awás Tingni v. Nicaragua*, par. 149

¹⁸³ CONADI, Ministerio de Desarrollo Social, 'Registro Público de Tierras Indígenas', accessed 17 July 2013, at <<http://www.conadi.gob.cl/index.php/registro-publico-de-tierras>>

their cultures, their spiritual life, their integrity, and their economic survival. A necessary given for lands to be demarcated as indigenous in the first place.

5.5. *Yakye Axa & Sawhoyamaxa v Paraguay: recovery of traditional land rights*

The *Yakye Axa* and *Sawhoyamaxa* cases were both filed before the Inter-American Court of Human Rights against Paraguay and both involve cases in which the indigenous communities had involuntarily lost possession of their lands, which have been (according to domestic property law) legitimately transferred to innocent third parties by the state. Both are seen in conjunction with and as follow up to the *Awás Tingni* case, yet their significance lies in the fact that in both cases decisions are made about restitution of territories, similar to the Hito Rangí request for restitution of their land. The judgments in these cases can help determine the dispute between Chile and the Hito family concerning the transfer of the territory to CORFO in 1970.

In both cases indigenous communities had been displaced by the state of Paraguay and were never given legal recognition by form of native title to their lands. The displacement of the communities had enormous negative implications on their nutrition and health, and thus threatened their traditional survival and integrity.¹⁸⁴ Both submitted their case to the IACHR who referred both cases to the IACtHR. The Court found Paraguay guilty of violations of art. 4(1) the right to life, art. 8 and 25 the right to fair trial and judicial protection and art. 21 the right to property.

The failure of Paraguay to adopt legislative measures to ensure in its domestic laws guarantees to indigenous peoples' effective use and enjoyment of traditional lands was heavily criticized by the IACtHR, which ordered the government to provide for laws in these areas and to demarcate the traditional lands immediately, to submit these to the indigenous communities at no cost and provide for basic goods and services necessary for them to survive.

Significance for the Hito Rangí case

Most significant are the Court's decisions concerning restitution of traditional lands. Under paragraph 128 of the *Sawhoyamaxa* decision it states that traditional possession of land by indigenous communities has an equivalent effect to those of state granted full property titles, which entitles indigenous communities to demand official recognition and registration of these titles regardless of the domestic legal system. Particularly in the case of members who have unwillingly lost possession of their lands, their property rights are maintained even if they lack a 'legal' title and even if the lands were later legitimately transferred to innocent third parties. If by the time of complaint a state is no longer physically able to return the land to its indigenous owners, it must provide the indigenous community with alternate lands of equal size and quality in order to safeguard their cultural integrity and livelihood. The Court reaffirms that art. 21 of the ACHR, although written with regard to the individual, can and must be viewed as a communal property right with regard to indigenous claims. Transfer of territory to private third parties, does thus not automatically extinguish indigenous property regimes either.

When the right to recovery is in place however, as identified in chapter 4, the state is given the discretion by the Commission or Court to identify ancestral lands to be returned (or otherwise demarcated/substituted). The Court has provided for certain guidelines, where it considers traditional claims heavily (due to possible gravity of displacing indigenous communities considering the land is often the most important factor of their survival) and consent or consultation as an obligation of the state. As also mentioned, the power of the Inter-American system to secure implementation of their decisions has proven a difficult task so far.

¹⁸⁴ Global Health and Human Rights Database, 'Sawhoyamaxa indigenous community v. Paraguay', accessed July 19 2013, at <<http://www.globalhealthrights.org/health-topics/health-care-and-health-services/sawhoyamaxa-indigenous-community-v-paraguay/>>

For the Hito Rangi clan this implies that if the government upholds that transfer of the territory was legal, it must still, on the basis of indigenous rights, grant them with an alternative territory of equal size and quality in order to safeguard their cultural integrity and livelihood. Also these judgments provide for the reasoning that indigenous territory is not automatically extinguished merely because the property has been transferred to a third party. Furthermore, as argued by Eliana Hito Hito, the family was not wrongly consulted of the transfer and could also be examined. Once again however, the close ties of the Hito Rangi clan with the territory must be proven in order for any indigenous entitlement to hold.

5.6. Conclusion

In all these cases the judiciary has voted in favor of the promotion and protection of indigenous land rights, except for the *Hopu & Bessert* case all qualify as landmark cases concerning this issue.

It reads from all decisions that traditional property or land tenure is valued very highly, especially because of the identified significance of land for the survival of indigenous communities. It places the needs or wants of the state at secondary level, due to the high risk of human rights violations that come with denial of traditional lands, and as this view becomes more and more reoccurring it is something states must seriously take into consideration even though they might have used these lands, or 'possessed' them for many years now. The cases confirm the trend detected in chapters three and four in which is concluded that there is a strong legislative and jurisprudential evolution recognizing the nature of indigenous peoples rights at all levels.

This imposes concerns regarding the judgment of the Chilean Supreme Court in the *Hito* case which has completely dismissed indigenous rights on the basis of the transfer of sovereignty and with it extinguishment of all rights to the territory by an agreement drafted in an era in which international law was used as a key instrument to territorial dispossession.¹⁸⁵ If the treaty still had any value today, its value would depend on agreed consent of both parties and exclude any domestication practices enforced by or through it at a later stage. The judgment, although transfer of the disputed property could most definitely be legally acquired by the current private owner, does not correspond with the contemporary framework created by international law concerning the rights of indigenous peoples.

¹⁸⁵ Gilbert, p.xiii

Conclusions

When the *Hito* case commenced before the Chilean national courts it appeared to be just another civil procedure in a property dispute, but this research paper has aimed to present the judgment's extensive implications for the indigenous rights of the entire Rapa Nui community in Chile.

In its judgment the Court rendered the property claim of the Hito Rangī clan of Hotel Hanga Roa unfounded as it determines that according to relevant property legislation the transfer of title with CORFO was legally binding despite allegations of the complainant towards CORFO of falsely obtaining the title over the territory. The Court also makes it clear that according to the *titulo provisario* the government only granted the complainant's grandmother the right to use the land, rather than own it. Rendering the state to have been the rightful owner of the property until an actual transfer of property was made to CORFO by granting it a *titulo gratuito*.

The judgment dismisses any indigenous claim for the land regarding the Hito Rangī, who are related to the indigenous community of the Rapa Nui. The issue and immense consequence of this judgment for the Hito Rangī clan and implicitly the Rapa Nui community lies in the decisive argument the Supreme Court uses to establish this 'fact'. According to the Supreme Court under consideration 2(b) it was the enforcement of *Acuerdo de Voluntades* in 1888 that extinguished any and all rights of the Rapa Nui to a traditional and ancestral right to property indefinitely as it made the ancestral inhabitants illegal occupants while at the same time determining the Treasury of Chile gained full possession. Remarkable as well is that the Court's interpretation of the agreement is based on the one made by the Chileans, with disregard of the Rapa Nui claim that clear reservations were made (in spoken language) concerning the right to land which would remain in hands of the islanders. Neither was the land ever returned to them through enforcement of the *Ley Indígena* as this law demarcates and reinstates indigenous territory since 1990, but does so under strict regulation of the CONADI, a governmental institution.

The consequence being that the Court renders only domestic legislation applicable to determine for the Rapa Nui what their rights, as indigenous peoples on Chilean territory are. The Hito case is a judgment that does not only deny the Hito Rangī clan the right to the territory of Hotel Hanga Roa –even if the territory is really not indigenous land- but this judgment denies completely all or any rights the Rapa Nui would have according to their indigenous status. A line of reasoning contrary to the conception of indigenous peoples rights within the contemporary framework of international law, as the last three chapters explain.

Contemporary international law on indigenous peoples (within the context of the Hito case) is founded primarily in the legislative framework of the UNDRIP, the ILO Convention 169 and the Human Rights framework of the UN and Inter-American system (and hopefully within considerable time the ADRIP), who share the same values concerning indigenous peoples and tend to reaffirms each other's interpretation in their legislative and jurisprudential decision making processes. Their treatment of indigenous peoples is the result of activities acknowledged formally by many states, but driven by the indigenous peoples themselves which has been the key to its success. Especially the Inter-American system has, over a short period of time built an elaborate conceptual framework of the right to land, territories, property and resources in particular.

These comprehensive practices of international law on property rights have broadened its scope to include collective traditional ownership on the basis of equality between all peoples and customary practices based on indigenous tradition and customs. To determine effectual application of traditional ownership, or native title the international institutions have defined certain requirements in its jurisprudence. In *Awes Tingni* the most important requirement is defined; the existing close ties of the indigenous peoples with the particular land. Further requirements include ancestral ownership over the lands prior to settlement and existence of an identifiable group or community today. From these requirements it is clear that the existence of indigenous property regimes must be seen completely

independent of prior identification by a state and rather be discerned by objective evidence that includes indigenous peoples' own accounts of traditional land and resource tenure. In particular the *Delgamuukw* case explicitly accepted indigenous customs, traditions, oral history and knowledge as their primary source to determine whether indigenous peoples could potentially enjoy a native title to the lands. Additionally the IACtHR in *Saramaka* concludes that state domestic legislation may never be a legitimate excuse to deny or restrict indigenous peoples rights to these territories. To conclude the controversy of the Hito judgment, the Australian High Court in *Mabo* determines historic acquisition of territorial sovereignty does not and may not automatically carry with it invariably that the beneficial title to all territory has been transferred, nor does historic international law which was based on racial and discriminative assumptions have any place in contemporary law of any kind.

Chile as a state has come a long way from complete domination, and within a changing trend in international law it has provided for some level of indigenous protection. From this research it shows however, that its legislation still too often relies on domestic policies and too little on the voices of its indigenous communities. In order to decide upon a matter concerning potential indigenous lands, it can no longer justify relying exclusively on its domestic legislation within the contemporary international legal framework.

This research has concerned the individual case of the Hito Rangi clan of the Rapa Nui community on Easter Island, yet it has simultaneously brought forward an overarching issue related to the promotion and protection of indigenous peoples' rights worldwide as the case of Chile is still no exception to many other states. I hope this research -the *Hito* case being a metaphorical example- has provided enough argumentation to verify the importance of the continuance of the evolution and promotion of specific rights of indigenous peoples within a larger human rights framework to effectively secure their futures in this world.

In light of the findings in this specific research, I would like to conclude with some possible improvements for the future of the Rapa Nui community and Chilean government. I would find it advisable that the Chilean government reassess its political commitments to furthering the development and recognition of indigenous peoples rights. This is not to say that this research does not acknowledge progress already made, but accentuates that its development is still far lower than the current norm in international law. Furthermore, it would be advisable for the Rapa Nui community to challenge the decision of the Supreme Court before an international Court, with regard to its assumptions of the enforcing capacities of the *Acuerdo de Voluntades* which would dismiss any viable land rights protection of the Rapa Nui community. Although enforcement rates of international decisions have proven to be very low, finding recognition of their rights before an international institution will bring the Rapa Nui another step closer towards domestic recognition, as to enhance change awareness must first be raised that an actual violation of international law has been committed by the Chilean Courts.

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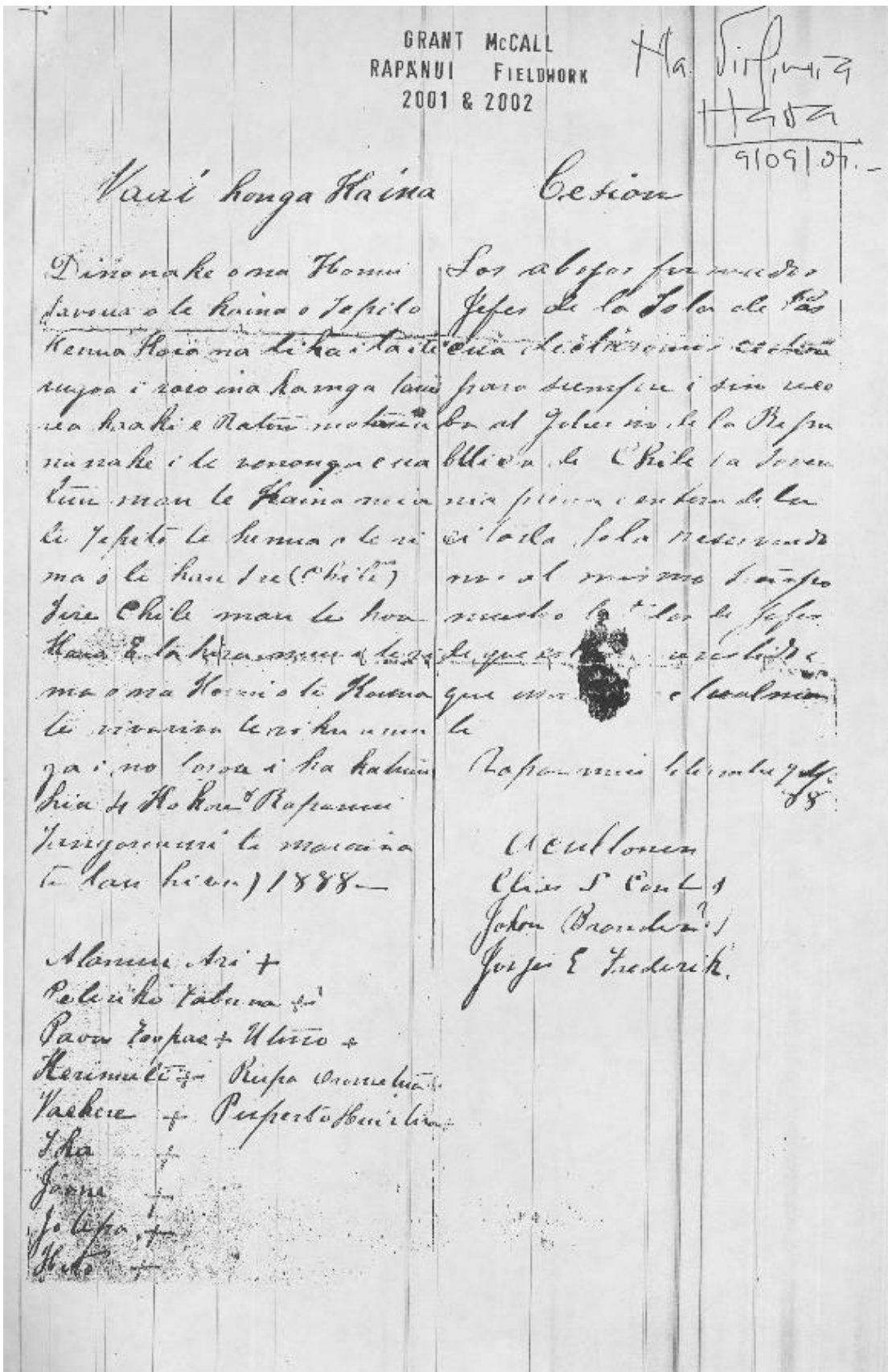
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Traducción al rapano.

Vananga Haaki

*Ko au ko Policarpo Toro, hoa
horo pahī ote hau tire he kape
rahi orunga ite miro tu'u ko
Angamos. E ma'u aaui ite ki o
nga Honui o mana te kaina ote
Pito o te Henua i tou rima ta
na nui ta ana kira ko vaai mai
a nga Honui ite kainga ote Pito
o te Henua o te hau tire (Chile)
ite vananga irotu ite parapara
i tā hia ite raa nei. E tiaki ra
kite vananga o te hau tire
(Chile) mo haka riva riva e
haka riku ai ite vananga i ta
hia nei.
Rapa Nui te kokore ote
marama.*

Tangaroa uri, te tau hiva 1888

Traducción al castellano

Proclamación

*Yo Policarpo Toro, amigo
marino de la nación chilena
(Chile), Capitán de un barco
con mástil "Angamos", llevo el
dicho del Consejo con poder
en el territorio de Te Pito o te
Henua en mi mano en este
escrito importante donde dice:
que lo que nos ha dado el
Consejo de Jefes del Territorio
de Te Pito o te Henua para la
nación chilena es el acuerdo
escrito en el documento en este
día. Esperarán la ratificación
de la nación chilena para
coordinar y desarrollar el
acuerdo escrito aquí.*

*Rapa Nui conteo lunar
Septiembre año extranjero
1888*

Realizada por:
Antonio Tepano Hito
Teraí Maca Puhī Hueke Atān
Mario Tuki Hey
Raul Taco Hey
Makari Zenteno Aparicio