

Rapanui and Chile, a debate on self-determination: a notional and legal basis for the political decolonisation of Easter Island

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40,000 words app.

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Rapa

*El rugir de las olas
del incesante clamor
en aguas transparentes
y desordenadas
con despertares irreverentes
e inaprensibles
de llamadas sencillas
pero inmoderadas
y a veces cuando cansados
condenados a soñar
de ser libres
al fin*



Por Curpa deros Chirenos

(Transcription of an audio-recorded conversation obtained from the beginning of the song *Eromai tepu* of unknown editor, authorship or copyright. This extract was part of a larger meeting that took place in the early 2000s at the Governor's offices)

Piru: *...por curpa deros chirenos!*

Official: **pero sí usted no quiere ser chileno, renuncie a Chile!**

Piru: *pero si yo no soy chireno nunca diríg chire!... nunca en mi vida!*
y ustedede' viene' a tomar la posesione' con este?!

Official: **Estamos respetándonos...**

Piru: *Dónde señor!*

Usted pidió autorización a nosotros lo' Rapanui?

Aquí están lo' Rapanui!

Aquí somos ministro de nuestra tierra...

[*¡Quién soy tu? pa' venir a repartir, cosas que no son tuyo!*]

somos ministros de nuestra tierra, de herencia

tenemos herencia heredera, ancestrales señores!

y usted los chirenos...no tienen cultura!

Por favor,

Saca tu bandera!

¡Saca tu gente!

Súbete al avión...

Lárguese de acá!

Manifiesto by Víctor Jara.

<http://www.youtube.com/watch?v=en8yqVxuT-U>

*Yo no canto por cantar
ni por tener buena voz
canto porque la guitarra, tiene sentido y razón
tiene corazón de tierra y alas de palomita
es como el agua bendita, santigua glorias y
penas
aquí se encajo mi canto, como dijera Violeta
guitarra trabajadora con olor a primavera
que no es guitarra de ricos ni cosa que se
parezca
mi canto es de los andamios para alcanzar las
estrellas
que el canto tiene sentido cuando palpita en las
venas
del que morirá cantando las verdades
verdaderas
no las lisonjas fugaces ni las famas extranjerías
sino el canto de una lonja hasta el fondo de la
tierra
ahí donde llega todo y donde todo comienza
canto que ha sido valiente siempre será canción
nueva.*

*I don't sing just for singing,
nor for having good voice
I chant because the guitar has sense and reason
it has heart of land and wings of little dove
it is like the holy water, it blesses glories and
sorrows
here my singing gets stuck as Violeta said
working guitar with spring
smell
which is not a guitar of rich people or
something alike
my chant comes from the scaffoldings for
reaching the stars
the singing has sense when it beats in the veins
of who will die singing the truthful truths
not the shooting flatteries nor the foreign fames
but the chant of a strip, up to the bottom of the
earth
there where everything arrives, and where
everything commences
chant which has been brave, it will always be
new song.*

Prologue

Atención, señoras y señores, un momento de atención:

Volved un instante la cabeza hacia este lado de la república,

Olvidad por una noche vuestros asuntos personales,

El placer y el dolor pueden aguardar a la puerta:

Una voz se oye desde este lado de la república.

¡Atención, señoras y señores! ¡un momento de atención!

(El Peregrino, Nicanor Parra)

This project is an ambitious attempt to review the tie between Chile and Rapanui according to law. According to Gonschor the people of Easter Island are entitled to obtain political decolonisation according to the United Nations' parameters and international treaties of which Chile is signatory.¹ This means that the thesis supports the proposition that Easter Island is “the” Chilean colony in Oceania, a belief shared by an important, though so far unquantifiable number of the island's citizens who have internationally raised the question no fewer than three times, in the recent past.²

¹ “Law As A Tool of Oppression And Liberation: Institutional histories and perspectives on political independence in Hawai'i, Tahiti Nui / French Polynesia and Rapa Nui” by Lorenz Rudolf Gonschor, a thesis submitted to the graduate division of the *University of Hawai'i at Manoa* in partial fulfilment of the requirements for the degree of Master of Arts in Pacific Islands Studies, unpublished, personal records, 2008.

² In 1983, the Council of Elders [...] sent a well publicised letter to the United Nations and to several world leaders, demanding justice for the Rapanui [...] Chileans feared that the Committee wished to promote independence.’ See “Rapanui and Chile. An example of Land and Colonialism from the Pacific” by Grant McCall, *Indigenous Affairs*, International Work Group for Indigenous Affairs, Copenhagen N° 4, 1994, 37; ‘In 1998, 1,200 Rapanui signed a petition to the UN decolonization committee and asked for a referendum on independence, with apparently no reaction.’ See n. 1, 157 quoting “Bilingualism, Social Change and the Politics of Ethnicity on Rapanui (Easter Island), Chile, unpublished dissertation, Yale University, copy in UH Hamilton Library, by Miki Makihara, 1999: 139; In 1998 the Council of Elders 2 remained for several months in the catholic church's courtyards displaying placards such as: ‘Rapa-Nui requires the fulfilment of the treaty made between the government of Chile and King Atamu Tekena on 9 September 1888.’ See “Scenarios of Tourism Development in Easter Island” by Francesco Di Castri, *International Journal of Island Affairs*, INSULA, Vol. 8, 1999, 36; Another placard said: ‘The people of Rapa Nui request the return of their lands seized by the Chilean state.’ See “Cultural Politics and Globalization on Rapa Nui” by Riet Delsing, *Rapa Nui Journal*, Vol. 12 (4), Easter Island Foundation, Los Osos, CA, USA, 1998, 102; ‘[T]he Secretary of the Decolonization Committee (C-24), [...] remembers speaking to some people from Easter Island around 2000, 2001 regarding participation in the UN's decolonization seminar and the C-24's substantive session. He explained to them at the time - that the C-24 is only mandated by the UN General Assembly to deal with the Non-Self-Governing Territories on the C-24 list (currently 16), so their participation was not possible. Since then, there have been no further contacts. In other words, for these reasons, no petition from Easter Island was ever put before the Committee.’ Lone Jessen, personal communication, May, 2009, Political Affairs Officer, Decolonization Unit, Department of Political Affairs, United Nations, NY.

Basically, political decolonisation is initiated when a territory is formally declared to be a Non-Self-Governing-Territory [NSGT] before the General Assembly of the United Nations on the initiative of the administering power. In the case of Rapanui it would be Chile which would move that it be included on the UN Committee on Decolonisation 24 list. The C-24 supervises gradual processes on decolonisation of colonies from their colonial administering powers. Chile has been a member of C-24 since 1962 (see footnote 497).

Apart from the unruly Senator A. Navarro who apparently supports the Rapanui protest for C-24 inclusion³, there are clear signs of Chile's unwillingness to support this point of view. To accept the double responsibility which the recognition of Rapanui as NSGT involves is difficult. It would serve to focus attention on Chile's international responsibility for maintaining a colonial territory in the Pacific without declaring it and despite its membership in the specialised committee established exactly to deal with that. The thesis will not go into conspiracy theories which may explain the inconsistent official behaviour yet, given the actual state of affairs and, in order to get concrete inclusion of the island on the C-24 list, the thesis proposes a specific means to achieve it: the notional-legal basis upon which the judicial decolonisation of Rapanui could be accomplished.

In other words, the thesis builds an imaginary case of political decolonisation, with coherent legal arguments through courts of law, in order to get the island onto the C-24 list. This will be done either by "recommendation" of the Inter-American Commission on Human Rights [IACHR], or by the "binding sentence" of the Inter-American Court of Human Rights [the Court] both of which are part of the judiciary of the Organization of American States [OAS] of which Chile is member.

Structure of the thesis

Chapter one contains the author's personal motivations for carrying out this MA project as well as commenting on the Pacific scholarship related to the issue. In other words, by giving an account of scholarship relevant to what Pacific Studies should be, as he sees it, the author places this thesis clearly within Pacific Studies.

³ Rafael "Rinko" Tuki Tepano, personal communications, May, 2010.

By using a deconstructive historical method, chapter two is dedicated to western reading of the legal notions of the Rapanui people when land use is involved. Chapter two establishes a notional basis for the political decolonisation of Rapanui by the rescue of a pre-colonial conception to be used in the present. This serves to understand the insider viewpoint when western concepts such as sovereignty and land ownership are rendered in Rapanui terms of reference.

Chapter three establishes the legal basis upon which the political self-determination of Rapanui may be accomplished. It argues on the basis of international law theory and practice. It proposes and argues a novel interpretation by re-periodisation of Rapanui colonial status and a re-definition of the legal status of the Rapanui people which contrast with traditionally accepted views.

Finally, chapter four lays the foundations for a future practical implementation of the notional-legal argumentation developed in the thesis. It does so by offering a judicial doorway for the Rapanui struggle for self-determination. It is based mainly on the legal status of Rapanui according to which the human right of collective self-determination could be claimed before courts of law. To do that, a novel interpretation of the law of the Organisation of American States and the Chilean Constitution is developed to convert the raw political debate into a refined legal conversation.

Chapter one: a Rapanui⁴ place in Oceania

El autor no responde de las molestias que puedan ocasionar sus escritos:

(Advertencia al lector, Nicanor Parra)

The self in Rapanui

What today has become my Master's project started six years ago, in June 2004, when working for the appointed Governor of Easter Island, Chile. My part-time job consisted, basically, in writing minutes and giving legal advice to the "Commission of Development of Easter Island" over which he presided. Codeipa⁵, as it is known, is a peculiar institution when compared with others within Chile's constitutional framework and is becoming increasingly notorious, perhaps, by reason of the democratic nature of the Rapanui participation in the debates or simply due to the fact that the government is innovating in allowing the people of Rapanui to participate in the policy-making process when use of the state-owned land of the island is involved. We can certainly say that land ownership as much as self-determination are probably the main issues in the politics between Rapanui and Chile as peoples and territories.

One of the peculiarities I found during Codeipa's meetings was to hear from either Rapanui leaders or officials, and the Governor too, the constant reference to "the Deed of Cession of 1888" [Deed 1888] through which the sovereignty of the island was ceded to Chile 122 years ago. A scanned-copy of the deed hangs on the walls of the meeting room where Codeipa has its sessions. It contains a bilingual version of the agreement and it is tirelessly affirmed by everyone as fundamental and indicative of the legitimacy of Chilean presence in Rapanui.

In 2001, two important facts had converged: one, the Chilean President of that time, set up "The Commission of Historical Truth and New Deal" [CVHyNT] which aimed to reset

⁴ I am following Fisher's proposition in calling the people and the island as Rapanui. See "Rapanui or Rapa Nui?" by Steven Roger Fisher, *Rapa Nui Journal*, Vol. 7 (4) December 1993, 73 – 75.

⁵ *Ley Indígena No 19.253* in URL <http://www.bcn.cl/leyes/pdf/actualizado/30620.pdf>. Created by articles 67 to 70 of the 'Indigenous Act of 1993', the committee of 15 members is presided by the appointed Province Governor of Easter Island and integrated by the Major, the President of the Council of Elders; five Rapanui representatives elected by popular suffrage every four years and seven other Chilean official representatives.

relationships between the Chilean state and its ethnicities based on one agreed historical truth.⁶ Thanks to that an Australian Ph.D. in anthropology and leading scholar in Rapanui studies, Grant McCall, was invited to participate in the CVHyNT. And, by using the contingency McCall revealed to the Rapanui community something hitherto unknown: in 1974 Juan Riroroko Mahute the son of the last king of Rapanui, *Riro*, gave him the duplicate, or one of the two original copies, of the Deed of Cession. McCall's revelation was stunning. Until that date Rapanui and Chile were just aware of the Spanish version of the Deed but never of the insiders' counterpart which apparently told a slightly different story on the issue of cession of sovereignty. Besides, it looked like people never knew that an alternative version existed. As far as we know, the government lost track of the duplicate. Many people were not even aware that "the" treaty was actually real, and that it had been held in secret by the last king's son and from 1974 by Dr. McCall.

In 2003 the report of the CVHyNT was finally published. It sanctioned both versions of the deed, Spanish and Rapanui, and concluded that the state of Chile had to ratify the treaty in order to incorporate it into the Chilean legal order and secondly by reason of the normative provisions of the agreement the government had to grant Easter Island a Statute of Autonomy.

So, here I found myself, in the midst of political struggles of which I had previously been completely ignorant. A young lawyer starting a new life a new job in a place of dreams, the typical depiction of Pacific islands, but, after discovering all of these affairs and trying to locate myself I rapidly became fascinated by these matters. I changed my relaxed mood, and I got serious about my job. I realised that I had an important position even though I had not looked for it, but since I was in the middle of grave issues (those to which others were committing their lives) I put all my energies into becoming a good advisor and looking for legal answers to the legal questions in front of me. My first feelings regarding the Deed 1888 were curiosity and mistrust, on the linguistic veracity of the translations which was done by politicians and also on the authenticity of the novel duplicate brought to Easter Island by Dr. McCall who is said to be "anti-Chilean".⁷

⁶ *Informe de la Comisión de Verdad Histórica y Nuevo Trato de los Pueblos Indígenas* [CVHNT] entregado a Su Excelencia el Presidente de la Republica de Chile, el 28 de octubre de 2003, Cuerpos I, II, III, Gobierno de Chile, 2003. Established by presidential *Decreto Supremo No 19 del 18 de enero de 2001, que crea la Comisión de Verdad y Nuevo Trato*.

⁷ When asked directly by me he denied it. Grant McCall, personal communication, April 2009.

If you live on an island of 4,000 people and you do get involved in politics, you will soon know who is who. Most of the persons who participated in the translation are well known by reason of their so-called radical stances. So, I thought maybe all these guys made a plot. Why not? Dirty politics were quite normal in Chile during the 1970s and 1980s. By accommodating a convenient translation of a bizarre document you probably will be able to impose an agenda of self-determination and by doing so get a negotiated doorway to obtain political autonomy while keeping Chilean citizenship. In my opinion, this moderate view (between independence and integration) is probably the wish of most of residents of Easter Island either ethnic or non ethnic Rapanui people.⁸ So far, the state of Chile has not followed the recommendations proposed by the CVHyNT report. Hence, positions have been radicalising since then.⁹

Until July 2007 I continued my job in Codeipa. Just before coming to New Zealand I lost it due to disagreements with the appointed Governor of that time. I was already identified as a sort of “double agent”: working for the government but taking sides with the Rapanui activism to get political autonomy. Indeed, I participated in the drafting of several either official or anonymous documents supporting Easter Island’s self-government. Such work is seen as contrary to Chile’s national interests. To Rapanui activists, on the other side, my work was useful due to the combination of two fundamental elements which are still rare for them: legal knowledge and a particular fluency in the Spanish language.

During those years, especially in 2005, and regardless of my inner commitment with Rapanui activism, I was still thinking of those Deed 1888 issues. I began my own research in two naïve ways: one, to get an alternative linguistic translation of the treaty (which in the end came to be very similar to the official one), and two, to seek the other duplicate which I believed (wrongly) to have been mislaid in archives in the mainland. Two unexpected outcomes, far from discouraging me to continue researching, stimulated my appetite for further exploration. In 2006 a delegation from New Zealand arrived on Easter Island and I became aware of the possibility of studying these issues in a comparative way. In New

⁸ There is some confusion amongst people about the practical meaning of the legal concept of “autonomy”. To me is “political”, to others “ethnic” or simply “administrative”. See for instance “Voces del Pacífico. Una Comunidad en Busca del Reconocimiento Autónomo” by Bárbara Escobar and Ximena Lagos, Tesis para optar al grado de Licenciado en Antropología y título de Antropóloga Social, Escuela de Antropología, Universidad Academia de Humanismo Cristiano, Santiago de Chile, 2009, 200-207.

⁹ Proem *News from Rapanui, May 2010*. The *Rapanui Parliament* alongside with sympathisers, are planted in front of the newly appointed Governor’s cabinet.

Zealand analogous issues were being discussed so I imagined myself in Aotearoa studying the Treaty of Waitangi vis-à-vis the Rapa Nui Deed of Cession and, I thought: “I could compare the Rapanui attitudes towards land vis-à-vis the Maori situation.” Obviously the themes and the politics are different as well but initially that was my approach to what is culminating here.

During those years I met a lot of people, no less that half of the indigenous population. People went to Codeipa to get solutions, mainly on mundane matters, but and also looking for approval, political support for their “illegal” occupations or takeovers on state-owned land. I will explain why I say “illegal” but it suffices here to refer to the well known fact that the state of Chile took 100% of the land without the permission of the owners and retains it despite the questioned legality of the appropriation and the clamour of the people. Around 80% of the land is owned by the state of Chile and many generations of islanders have struggled to recover the possession of their ancestral *kainga*.¹⁰

After dealing with amazing personalities and listening to diverse and sometimes apparently contradictory positions, I started thinking about the idea I have developed in chapter two. I launched myself into believing that Rapanui minds converge and are concomitant in at least one thing: most of the people I encountered did not make a clear distinction between sovereignty and land ownership. For me, a man educated in the western school of thought, it was quite simple to distinguish it. But to many of them it was not. I began to convince myself that this perception was more than a trickery to get benefit from the government by mixing up private and the community-as-a-whole’s interests. Land ownership issues were and are confounded with sovereign matters without awareness of the theoretical divergence of approach to each theme.

Let me exemplify it. I am an MA candidate occupying a prefab at 16 Kelburn Parade and by this sole fact I believe that Victoria University of Wellington has to listen to me to decide what to do with the real estate which lies underneath my working place. Ridiculous? Well, many can relate accounts of how influential politicians from Chile’s mainland have come to the island, sat down at the negotiation table very open to listen Rapanui demands, suddenly shift in their chairs when they realise that the Rapanui are determined to use their own ways

¹⁰ See “Articulating Rapa Nui: Polynesian Cultural Politics In A Latin American Nation-State” by Maria Riet Delsing, a dissertation submitted in partial satisfaction of the requirements for the degree of Doctor of Philosophy in Anthropology, *University of California Santa Cruz*, USA, unpublished, personal records, 2009, 125 – 126.

to negotiate common issues. To even set up the terms of reference of negotiations across cultural and political divides in Rapanui is difficult and one of the reasons for that is, in my opinion, the content of their notional-legal representation of the world, especially when dealing with *henua* or land of their ancestors.

The self in Oceania

What is Pacific Studies? After two years, I am still wondering about it, yet the first idea that comes to my mind is the individuality behind the Pacific scholar. In chapter one and in the epilogue, the reader will find my personal point of view and the individual drivers which motivates my studies. I would like to warn as well that this section might not seem entirely academic and the reader might feel some perplexity due to my style of writing and my propensity towards unveiling hitherto self-repressed desires of methodological libertinage. Tony Angelo wants to call it “stream of consciousness”, Teresia Teaiwa describes it as my post-modern approach; to me it aims to be anti-poetical. Certainly, I am neither James Joyce nor Nicanor Parra. Perhaps the reader will find this section academically very unconventional but I believe that as long as coherency and clarity are respected we cannot afford to constrain researchers to certain patterns, especially in arts.

Pacific Studies is about this; it is something revisionist in that it seeks epistemological alternatives for building knowledge. Pacific Studies wants to capture further terrain. Yesterday decolonisation was confined to politics but today Pacific Studies involves methodological decolonisation. In other words, Pacific Studies, and particularly, Native Studies of indigenous populations of the Pacific region, wishes to enter in an academic post-colonial stage of researching for roots, rescuing of ancestral knowledge applied to modern needs and circumstances. This is precisely, that it is what I want to do, especially in chapter two. Scholars such as David Gegeo for instance have done it in a practical way by getting into the thinking of the Kawara’ae people’s (from Solomon Islands) and their epistemological approaches which far from being traditional and fixed are constantly evolving in reciprocal and challenging relationship with reality. To Gegeo that is ‘indigenous knowledge’.¹¹ Linda Tuhiwai-Smith has

¹¹ “Indigenous Knowledge and Empowerment: Rural Development Examined from Within” by David W. Gegeo, *The Contemporary Pacific*, Vol. 10, No 2, Fall 1998, 289-315; also “The Pacific imaginary: Shifting Paradigms in

called us to overcome colonial legacies by decolonising our methodologies.¹² Jeffrey Sissons has argued that '[c]ontemporary indigeneity is not simply about preserving traditions and meanings' but also the ability to transform them to adapt to the circumstances of outsiders' policy-making ruling.¹³

As a field, Pacific Studies wants to see its own 'cultural renaissance' targeting exactly what to western societies are just ways of, say, artistic expressions.¹⁴ Pacific Studies wants to regain the territory lost by the negative influences of colonialism and its written-word ship by bringing epistemological alternatives to western paradigms of knowledge construction. I am not sure whether this will be truly alternative to the Cartesian *mathesis*¹⁵. Yet I am still a believer that oratory, critical discussion, poetry, dreams, dance, songs, enlightened dialogue, cultural events, meetings (*Talanoa*, *Fono*, *Ho'oponopono*, *Matauranga*) land-human interactions, intuition, spirituality (beliefs, worldview) daily awareness, participant observation, and other proceedings symbolizing indigenous holistic-understanding such as the *Kakala* in Tonga, are all ways of valid epistemological renascence. Vilsoni Heneriko from Rotuma has been a leader of the hosts of Pacific writers and artists for re-vindicating all those renewed ways of knowledge.¹⁶

None of these Pacific epistemological ways are strange to me. The Rapanui people are already regaining their decolonising space through the arts which is 'the only thing they cannot take away from you.'¹⁷ Although, I guess, most of Rapanui people are not completely aware of today's Pacific academic revolution and, are unaware of the fact that they still are in the previous basic stage of political decolonisation, amazingly they have been capable of adapting to their the circumstances given by its political reality.

Pacific Scholarship: Towards Island-Based Methodologies, Epistemologies and Pedagogies" by David W. Gegeo, Session 1, Fono, Fale Pasifika, University of Auckland April 16th to 18th 2008.

¹² *Decolonizing Methodologies. Research and Indigenous Peoples* by Linda Tuhiwai-Smith, Zed Books Ltd., London, University of Otago Press, Dunedin, New Zealand, 1999.

¹³ *First Peoples: Indigenous cultures and their futures* by Jeffrey Sissons, Reaktion Books Ltd., London, 2005, 15.

¹⁴ "Future Directions for Pacific Studies" by Stewart Firth, *The Contemporary Pacific*, Vol. 15, No I, spring 2003, 140.

¹⁵ Through the epistemic principles of *mathesis* knowledge can only be acquired intuitively or by deduction, by pure observation or by valid inference from indubitable premises. *A genealogy of sovereignty* by Jens Bartelson, Cambridge studies in international relations, series 39. New York: Cambridge University Press, 1995, 143.

¹⁶ "Indigenous Knowledge and Academic Imperialism" by Vilsoni Hereniko, *Remembrance of Pacific Past: An invitation to Remake History*, Borofsky, Robert, (ed.), University of Hawai'i Press, Honolulu, 2000, 78-91.

¹⁷ Galumalemana Alfred Hunkin, Senior Lecturer Va'aomanu Pasifika, personal conversation, March, 2010.

They are transforming and revitalising their understanding of their own inherited culture and the legacy they want to leave to their successors.

But, let me return to the idea of individuality. Individuality does not mean necessarily individualism. Teresia Teaiwa warns us to be aware that, in practice, Pacific Studies is not a place where you will find people who do not have highly personalised expectations targeted towards certain directions. My individual circumstances triggered in me inner wishes of justice which I want to share with the people to whom I owe my awakening. My cooperative individuality has likewise carved inside of me awesome liberating forces.¹⁸

I need again to warn the reader that far from hiding agendas I have for the sake of Pacific Studies goals, to open my intentions. Pacific Studies was once a fertile land for ethnographers and anthropologists and others who believed, wrongly or not, they were doing well by analysing people like laboratory mice. Today this approach is unacceptable and seen as the unwished sibling of 'European imperialism and colonialism'¹⁹ because the ultimate rationale rather than understanding was to influence.²⁰ In chapter two, I reread those "laboratory ethnographies" between the lines and by so doing I try to dismantle those representations to reconstruct a rescued one.

Terence Wesley-Smith has said that apart from the classical 'laboratory rationale' in order to justify studies in Pacific islands the so-called 'empowerment rationale' is acceptable. I felt touched when he reminded us that '[t]he decolonization of the region remains incomplete.'²¹ To him the 'empowerment rationale' is one of the responses to 'Western academic hegemony'²² whereas to me it means to empower myself in searching for a solution for the contemporary colonialism practised on Easter Island. Even more I do maintain as Terence does that we need to adopt a 'selective adaptation' of western academic tools to create genuine 'universal forms of

¹⁸ "L(o)osing the Edge" by Teresia Teaiwa, *The Contemporary Pacific*, Volume 13, Number 2, Fall 2001, 352.

¹⁹ N. 12, 1.

²⁰ "Rethinking Pacific Islands Studies" by Terence Wesley-Smith, *Pacific Studies*, Vol. 18, No. 2, June 1995, 115-137.

²¹ N. 20, 124.

²² N. 20, 125.

scholarship' for the needs and circumstances of non western societies and cultures.²³

My ambition goes further to becoming an intellectual bridge between islander and mainlanders colleagues. Throughout the writing a place of priority is given to my first-hand experience which does not mean renouncing to truthfulness and veracity demanded by legal and honest indigenous analyses. I seek to bring the voice of those without academic voice or to make the voice more audible.

The teacher says: "What is the common ground of the Pacific?" (Mmmmm, cultural diversity vis-à-vis common roots?) "Geography!" I said. Wrong! The Pacific region once was colonised and divided by artificial boundaries drawn in the sea, but today is a region of independent countries (or in ways to be) fully diverse in ways of living, knowing, thinking, being, etc... "There is no Pacific at all", she says. "What is the Pacific?" Oh, well, it is not "the Pacific" but Oceania...

Epeli Hau'ofa's Oceania is a 'sea of island'.²⁴ Oceania is no longer the outcome of colonial legacies which have wrongly made islanders believe in their condemnation to depend for ever on something located overseas. He said that Oceanic peoples need to believe in themselves in their capacity, amongst others, to inter-connect their kin, souls and islands. He died wishing to see Oceania in expansion as the Big Island of Hawai'i expands as a result of volcano eruptions.²⁵ How does Rapanui fit in the Pacific-Oceania redefinition? Rapanui, paraphrasing Epeli, is not an island in a far sea as historically represented by aliens. Rapanui wants to belong to the post-colonial era of 'sea of islands'. It does not want to be relegated, not anymore, to the Pacific backyards but to be integrated into the "sea of islands" rationale.

It is true, "me Chile" acknowledges political responsibility for convincing Rapanui people to believing that they need me even to survive. I recognise that is no longer true, if even it was true. What? What are you saying? Yes my brother we have behaved badly! Believe me... I know you are responsible but anyone may be blamed because of this. I know, I know, you never were taught about this, nobody told you about the oppression which was having place not too much time ago. Have hopes because there is a time for change and you and me are no longer predators but friends of the island of in the sea of islands."

²³ Concept from n. 20, 125 quoting Alatas 1993, 312.

²⁴ "Our Sea of islands" by Epeli Hau'ofa, *A New Oceania: Rediscovering Our Sea of islands*, Naidu, Vijay, Waddell, Eric, and Hau'ofa, Epeli (eds.), SSED, USP in association with Beake House, Suva, 1993, 65.

²⁵ N. 24, 69.

Following Epeli's thinking, I would like to see Rapanui in this sea, firstly by inclusion of it in the cartography of the so-called South Pacific. "What? Yes my friend, there is nothing more annoying than to find that most of maps do not include Rapanui in the *conciencia colectiva* of Oceania." Apart from that, I would like to see Rapanui included in the post-colonial game of political decolonisation. "Do you think that the cartographic obliteration is indicative of world's oversight of the fact that the *Moai* (big stone statues) were actually built by the ancestors of these still alive Polynesians? Oh yes I do, actually the oblivion was determined by that, but not completely, and you know why? There is always a series of factors, some unintentional others unlucky and, well, others... but the thing is that today the legal reality is becoming visible thanks god, and we don't need maps to tell us!" Rapanui is proud of being people and Polynesians, or Oceanians, in constant evolution, culturally flexible as the sea of island. And sooner rather than latter, both the continent and the "incomplete-sea of islands" will realise the need to respect that.

'On dit de l'Afrique que' elle est le continent oublié. L'Océanie, c'est le continent invisible.'²⁶

The self in the Oceania epistemology

My methodological approach is not quite inter-disciplinary, which is another clue to understanding the field of Pacific Studies. For the most part, my background is basically legal including Political Theory, Roman Law, History, International law, and Constitutional Chilean law. Actually, chapters three and four are mainly legal. I guess only in chapter one and in the epilogue I am on purpose experimenting and crossing academia frontiers. I acknowledge that this comes mostly from my fluid contact with Teresia Teaiwa and in the last stage thanks to professor Angelo. In chapter two, as I said, I will reread colonial ethnographical and anthropological resources to represent in a deconstructive way. Personal communications are brought as well to be analysed through the lawyer's lens, and scattered-in-my-mind memories of six and half years of living in the island are included too. To represent it in a "*Pasifika* way", methodologically my aim is to cross fearlessly accessible knowledge to build a new approach towards the Rapanui matter. I want to follow the

²⁶ Raga. *Approche Du Continent Invisible* by J.M.G. Le Clezio, Editions du Seuil, Paris, France, 2006, 9.

pattern of *tuku tuku*, or the Rapanui system of foreshore fishing with a net.²⁷ You throw and pull it back then you walk a few metres to then put it again into the sea.²⁸ By overlapping your own area of fishing then you get something in the end: being intuitive and methodical at the same time. I am a just fisherman of all the *Habermasian* inter-subjectivity, where knowledge ‘is the by-product of dialogue, or of something exchanged with others’.²⁹

Metaphorically, as well, I want to become the builder of the roof of a *hare*. Commonly the *hare* is the house. Here, is the *hare* is the Rapanui’s dwelling of liberty and sovereignty or the essential first-place where social interaction is developed amongst human beings and the place where *pu’oko*, head, is protected from the avatars of life. The current *hare* of sovereignty has no roof. It is at the beginnings of its construction, only the “floor” is done, or the endless cry for freedom. The methodological walls of knowledge are not there (because they are still in the minds and dreams of them and because they are not meant to be made before the roof). The legal roof will cover the intimacy of this noble country and culture, but it needs to be built in relationship, in conjunction with them, and not only with my representations. That is why this does not need to end here but only to start...

²⁷ *Diccionario Ilustrado Rapa Nui Español Ingles Frances* by various authors, segunda edición, Universidad Católica de Temuco, Pehuen Editores, Santiago, Chile, 2006, 54.

²⁸ Andres “Chapo” Ika, personal communication.

²⁹ “Our own liberation: Reflections on Hawaiian Epistemology” by Manulani Aluli Meyer, *The Contemporary Pacific*, Vol. 13, No 1, Spring 2001, 134.

Chapter two: Sovereignty and land ownership from the *Easter[n] angle*³⁰

Generalities

I am proposing a project towards the political decolonisation of the island of Rapa Nui which should not be circumscribed to the discussion on sovereignty but also on the matter of land ownership, altogether. As Kuehl argues, I think that a polity-based international-level approach to address the theme of human rights of indigenous peoples is needed.³¹ In other words, the matter of superseding post-colonial era by avoiding neo-colonial practices and through a new delimitation of the liberal political structure, the egalitarian system of freedoms upon which all cultures and its comprehensive moral conceptions can live altogether.³² The political theory's proposition I am presenting in chapter two aims to theoretically enlarge the area of influence of first-peoples polities and cultures within the conceptual framework of liberal societies.

Having in mind that chapter two's starting point is philosophical. It wants to explore up to the limits of the western representational bond with land and it does so by following a deconstructive method. The concepts of sovereignty and ownership are seen as two sides of the same western-legal coin: The bipolar way whereby occident represents, through individuals or collectively, respectively, its nexus with land. This notional representation will be contrasted with those apparently observed in early Polynesia. From a legal point of view, is conjectured that some pre-contact Polynesian societies (Samoa, Tonga, Marquesas, Tahiti Nui, Huahine, Rapanui and New Zealand's Maori) seemed to have mixed, in one concept, what to us functions as two overlapping ideas: the sovereign power of state asserting domination over land and the individual right to possess that same land. The thesis

³⁰ Here I am playing with the Easter and Eastern Island nomenclatures. Easter, due to the date of western first contact, Easter Sunday of 1722 and, Eastern, due to its geographical marginal location within the so-called Polynesian triangle.

³¹ "Towards a Fairer Game: Taking Measures Against Polity-Based Discrimination Of Indigenous Peoples Under ICERD" by Melf Kuehl, LLM research paper *LAW 524: Indigenous Peoples & International Law*, Faculty of Law, Victoria University of Wellington, unpublished, personal records, 2009.

³² *A Theory Of Justice* by John Rawls, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1971. Also, *Political Liberalism* by John Rawls, New York: Columbia University Press, c2005.

conjectures on the ‘political dimension’³³ of the land tenure system in ancient Polynesia to conclude that a “unified” legal and political concept was behind it. According to this redefinition, ethnographers and anthropologist used to (and also today) misrepresent the unified concept by resembling it to law-of-property’s nomenclatures such as land ownership.

Chapter two suggests a political science’s reformulation towards the so-called “traditional land tenure system” in terms of diverting the analysis from the law of property rationale to the theory of state and power but from the perspective of indigenous-polities. It is depicted as inappropriate the current analysis of the theme of land tenure system because, *inter alia*, assumes too easily the notional components of the Roman Law’s ownership faculties which are absoluteness, perpetuity, exclusivity and indivisibility. In contrast, when applied in Oceania and specifically Easter Island, it is argued that the land theme should not be discussed without considering both sovereignty and land ownership as part of the same Oceanian paradigm.

This chapter is an attempt at *deconstruction*³⁴ of the cultural-notional basis of the legal concepts of *ownership* and *sovereignty*. It reviews their historical evolution having in mind the contemporary political science discourse of ‘meta-sovereignty’ proposed by Jens Bartelson³⁵ and the idea of finding an appropriate approach towards the Sissons’ ‘Indigeneity project’³⁶ in order to imagine a decolonised Rapanui polity.

I am arguing that the absolutist “supreme” idea of power in western societies is notionally underpinned by Roman law of property’s components such as absoluteness, indivisibility, exclusivity and perpetuity. It does so through two overlapped legal conceptions concerning the governance of territory: land ownership and modern sovereignty. Both constitute the two sides of the same legal coin. On the other hand, I am arguing that both, the early “loose” possessive and the “lax” ownership Polynesian³⁷ conceptions of apprehension and

³³ *Māori Custom Law* by Eddie T. Durie, Wellington, New Zealand, personal records, unpublished, available in Pacific Studies school library, Victoria University of Wellington, January 1994, 64.

³⁴ N. 15, 20. The philosophical strategy of deconstruction is a way of exposing the meaning of concepts to internal criticism, addressing precisely to that which is taken for granted or regarded as unproblematic by a scientific analysis.

³⁵ “The concept of Sovereignty Revisited” by Jens Bartelson, *The European Journal of International Law* vol. 17 no. 2, pp. 463-474, 2006.

³⁶ N. 13.

³⁷ By “Polynesians” I am referring to peoples of Samoa, Tonga, Marquesas Islands, Tahiti Nui, Huahine, Rapanui and New Zealand.

dominion and, the Eddie Durie's flexible-variable character of Maori (from New Zealand) customary law come from the same notionally relativist paradigm.³⁸ Normally, law is conceived as being accompanied by governmental coercive apparatus and the absolute *imperium* of its 'enforcement agencies'.³⁹ Therefore, can we conceive "law" without enforcement agencies? Although a question for another paper it is still pertinent as far as international law effectivity concerns.⁴⁰ It was not until western contact when the institutionalisation of force became reality in the Maori society of New Zealand.⁴¹ Does it mean then that the lack of institutionalised force diminishes "Maori law"? Was Maori law then just a bunch of customary practices? Maori people actually did have an oral customary law but, unlike western law, which gave consistency and *auctoritas* (authority) to the customary practices and what gave to Maori law its imperative character required by every legal order was, basically, the ideology of *mana* and *tapu*. From this early magical platform the apparent "legal vacuum" was filled.

The western propensity to classify the reality has been widely described. By replicating the Hellenistic model, Roman law distinguishes amongst persons, actions and things to determine the law applicable. Polynesian societies instead did not classify, like Greco-Roman societies did. For example, they did not differentiate between public and private spheres, or individual and common interests, or the capability of the thing to be moved or not, that is, between *moveable* and *immoveable* property. However, it seems that pre contact Polynesians drew distinctions when assessing the value of "land" or, in legal-Roman terms, "immovable property". In fact, the *whenua*⁴² understanding was (and is) a core cultural value and political driver. Analogously, the nowadays holistic concept of *Gaia*⁴³ would be the equivalent to that Maori notion. 'People belonging to land' or the *tangata-whenua* relationship is one of the basic ideologies of Maori people.⁴⁴

³⁸ Eddie T. Durie was Chief Judge of the Maori Land Court.

³⁹ Concept from PhD Danny Keenan, "Issues in Traditional Maori Society", MAOR409, *Te Ao Onamata*, School of Maori Studies, *Te Kawa a Maui*, Victoria University of Wellington, 2008.

⁴⁰ *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* by Paul McHugh, Oxford University Press, Auckland, 1991: 167.

⁴¹ N. 39.

⁴² N. 39. Land, sea, rivers and in general the entire environment, habitat, fell under the scope of *whenua*.

⁴³ *Gaia: a new look at life on earth* by J. E. Lovelock., Oxford University Press, New York, c1987. The earth is a self-regulated living being, a super-organism of which we are a part of.

⁴⁴ N. 33, 62.

Like the Romans, Polynesians regarded *movable* things as part of the human commerce or capable of constituting personal property. But, unlike Romans, their notions were embraced by “loose” conceptions of possession and embedded in “lax” understandings of ownership. They ruled social exchange, trade and their whole polity accordingly. I am reinterpreting ethnographical sources to arrive to that conclusion. What also constituted a special feature distinguishing ancient Polynesian societies from Romans it was what today we call “real property”. Real estate was not a commodity and not considered object of ownership. In other words, rather than *monopolizable* by exclusion the land was conceived to be collectively controlled, tribally distributed, familiarly occupied. And, beyond poetry, the alleged bond between *tangata* (people) and *whenua* (land) was, in consequence, very political and disputable. I am arguing that depicting this “bond” as *common* or *collective ownership* is inexact. As mode of example I have identified three scholars following the already classic common place depiction: Haunani-Kay Trask for Hawaiians; Riet Delsing for Rapanui and Richard Hill for Maori people.⁴⁵

In my opinion, this special understanding of “the control of *whenua*” is not analyzable through the law of property prism but from the perspective of political theory. Furthermore, neither common nor individual ownership would fairly represent the “Polynesian land tenure system”. Logically, and in contrast, the Roman institution of *dominium* (absolute ownership and control of property) was not built upon “loose” or “lax” notions of possession and property. Rather, the Roman Law was constructed from within and upon its own cultural framework, that is, upon the idea of absolute, indivisible, exclusive and perpetual supremacy and power. Firstly, I will take a step back by dismantling the ideology, the conceptual framework, the cultural notions lying behind these legal “specimens”; *sovereignty* and its ideological begetter the Roman *ownership*.⁴⁶

Secondly, I will reread key linguistic and ethnographic sources, which will allow me to speculate on the legal nature of an ancient Polynesian conception of personal property and

⁴⁵ *From a native daughter: colonialism and sovereignty in Hawai'i* by Haunani-Kay Trask, Honolulu: University of Hawai'i Press, 1999; also “Self Determination or Integration? The Uneasy Relationship between Rapa Nui and Chile” by Riet Delsing, paper presented at symposium *Politics of Sovereignty. Colonial Legacies in Oceania*, Americas Forum, Center for the Americas, Wesleyan University, pp. 1-28, 2006; also “Tangata Whenua/The People of the Land: The Role of the Land in the Maori Struggle for Rangatiratanga/Autonomy in Aotearoa/New Zealand” by Richard Hill, paper presented to the *Annual Meeting of the Gesellschaft für überseegegeschichte*, Universität HAMBURG, Perceptions of land in Societies outside of Europe from the 17th to the 20th century. Hamburg, 2 June 2007.

⁴⁶ “Although, they are distinct and separate, ideology and law have an indisputable kinship and internal relationship.” *Law and politics in the Middle Ages. An introduction to the sources of medieval political ideas* by Walter Ullmann, The Sources of history: studies in the uses of historical evidence. Ithaca, N. Y.: Cornell University Press, 1975, 27.

land governance. Also I will see how this conception might be contrasted with or to be compared to the Roman and western conception of ownership and sovereignty, respectively and alternatively.

***Tangata whenua* resilience, Indigenism and alternative Global Politics**

On the one hand, my argument is based on the Indigeneity project of Sissons which is ‘a distinctive form of identity politics within post-settler states’⁴⁷ which contrasts with the more generalized projects of eco-ethnicity⁴⁸ and cultural survival.⁴⁹ On the other, it is also encouraged by my experience on Rapanui. I believe in the existence in modern Rapanui society of, paraphrasing Kawharu, an ‘ideological core’ that ‘would seem to accord fairly well with views held in the past’.⁵⁰ I am not intending to explain how this land ideology has persisted over time but rather to stress the today’s stubborn Rapanui stand when land is involved. I witnessed resilient behaviours which to me are based on traditional land tenure understandings still alive, in some way, in present times. Although “the” understanding does not manifest itself always through coherent discourses yet it seems to be sincere and not a product of fake impostures as some have adopted in retort to colonial and neo-colonial impositions.

I interacted with several voices claiming something not known for my western-legal trained-mind, a distinctive point of view in regards to landholding. The relevance of indigenous kinship and its ‘ongoing relationship’ or ‘long-standing bond with’ the land and natural environment, has been amply highlighted by Sissons, Mason Durie and Haunani Trask.⁵¹ In the Maori worldview, ‘[l]and ownership still retains a largely symbolic significance by underpinning kin group membership and a person’s status as *tangata whenua* (someone who belongs to land)’.⁵² Analogously, to the Rapanui people the *kainga* concept implies that

⁴⁷ N. 13, 17.

⁴⁸ N. 13, 17 – 24. The eco-indigenism discourse equalises indigenous peoples with having subsistence economies and being close to Mother-Earth or relative closeness to nature. This speech has primitivized or called into question the authenticity of those who adopted urban lifestyle. Eco-indigenism is a discourse that seeks to revalue primitivism and tribalism in relation to destructive western rationality and individualism.

⁴⁹ N. 13, 12. Historically, the project of the settler nationhood has sought the elimination of indigenous identities and therefore contemporary first peoples can view their cultures only as cultures of survival.

⁵⁰ *Maori Land Tenure: studies of a changing institution* by Ian Hugh Kawharu, Oxford New York, Clarendon Press, 1977, 37.

⁵¹ N. 13, 33; also “Race and Ethnicity in Public Policy. Does it work?” by Mason Durie, The Social Policy, Research & Evaluation Conference 2004, *What Works?*, Academy for Maori Scholarship and Research, Massey University, Wellington, 25 November 2004: 2; also n. 46, 115 – 117.

⁵² N. 13, 27.

people are in ‘umbilical connection to the land’ and that land therefore ‘cannot be transferred or ceded.’⁵³ According to Delsing it was not until the end of the 19th century that ‘some Rapanui were beginning to lose their intimate contact with and deep connection to the ancestral lands’ *kainga*⁵⁴, which used to determine ‘tribal affiliations and customary practices in which the land was intrinsically inalienable’.⁵⁵ In the same manner, according to Trask, pre-contact Hawaiians rather than as owners they considered themselves as ‘stewards’ of the land.⁵⁶

My question is therefore how, within the post-colonial⁵⁷ political context, to give legal shape to this alleged holistic worldview entirely unknown to settler European cultures by avoiding, at the same time, eco-indigenism impostures? How might I give legal content to this noteworthy concept which has proved to be an endless ‘foundation for cultural resistance’?⁵⁸ How might societies build alternative global politics within nation-states to create a system that addresses as much of each system as possible?⁵⁹

The western coin of Ownership and Sovereignty: Its origins and characters

Ownership is the legal substratum of sovereignty. It was the Roman classical conception of ownership on which sovereignty has erected (probably unconsciously) its successful political career.

According to Sissons, Dr. Taiaiake Alfred has argued that if we accept sovereignty as such, we are endorsing a set of values and objectives in direct opposition to the values and

⁵³ “Vaai Hanga Kainga Giving Care to the motherland: conflicting narratives of Rapanui” by Santi Hito, State University of New York, Empire State College, New York, USA, *Journal of Intercultural Studies*, Vol. 25, No 1, 2004, 26; Also on the meaning of the concept of *benua* in earlier Polynesian societies, see *When Home Is The Navel Of The World. An ethnography of young Rapanui between home and away* by Olaug Irene Røsvik Andreassen, A thesis submitted for the degree of Doctor of Philosophy School of Sociology and Anthropology, University of New South Wales, March 2008, iv.

⁵⁴ Delsing n. 45, 7 footnote 5 quoting Metraux, 1971 and Kirch, 2000, 272. ‘The concept of *kainga* has more than one meaning. I use it here as territorial unite, constituting the estate of a clan or descendent group.’

⁵⁵ Delsing, n. 45, 7.

⁵⁶ Trask, n. 45, 115.

⁵⁷ N. 13, 154, *post-colonialism* ‘is a process that involves the disengagement of colonizers and colonized from their former relationship of mutual entanglement and definition.’ Post-colonialism is a condition of both post-settlers nations and indigenous peoples as they seek to redefine the terms of their relationship with each other.

⁵⁸ N. 13, 34.

⁵⁹ Melf Kuehl, personal communication, April 2010.

objectives found in most traditional indigenous philosophies. Even non-indigenous politicians recognize the inherent weakness of a position that asserts a ‘sovereign right for peoples who do not have the cultural frame and institutional capacity to defend or sustain it’. Alfred has exhorted indigenous people to detach themselves from the notion of sovereignty and ‘its legal, western roots’ because sovereignty does not understand its own relationship to the land by ‘traditional values of sharing’ but through territorial control and domination. To him, the post-imperial world should return to traditional values of caretaking ‘rather than perpetuate western models of sovereign domination and control.’⁶⁰ Moreover, to Sissons, both the ambiguous Eurocentric notion of sovereignty and the idea of self-determination are inappropriate for indigenous peoples’ goals. To Sissons, the territorial integrity of states is ‘crucial’ whilst for indigenous leaders the aim to pursue is ‘political and cultural autonomy within states’.⁶¹

Leon Duguit (1859-1928) argued against the unacceptable consequences of the individualistic system of property and the prevailing ideas of sovereignty. To early twentieth-century Duguit, the social function of property was meant to replace the individualistic and metaphysical conception of subjective right which came from individualistic Roman ownership.⁶² Based upon Comte’s positivism⁶³ Duguit argued that the individualistic system of property allowed the existence of capricious owners who may choose to not use, to not dispose or ‘derive benefit from’ land but instead to leave it unproductive and useless to collective purposes.⁶⁴ To him, saying that a possessor had a right was equivalent to saying that he had a power superior to and prescriptible upon the will of other individuals.⁶⁵ What to me is remarkable here is he was already capable of identifying our main postulate by

⁶⁰ N. 13, 123 quoting “From Sovereignty to Freedom: Towards an Indigenous Political Discourse” by Dr. Taiaiake Alfred, *Indigenous affairs*, 2001, no 3, 28.

⁶¹ N. 13, 127.

⁶² “Le droit social, le droit individuel” by Leon Duguit, in *The Progress of continental law in the nineteenth century, by various authors*. The Continental legal history series, v. 11, South Hackensack, N.J., Rothman Reprints, reprint of the 1918 ed., 1969.

⁶³ The question of social use of property in Auguste Comte (1892). *Système de politique positive*, quoted by Duguit in various authors n. 62, 134.

⁶⁴ [...]to leave his lands uncultivated, his city lots unimproved, his house untenanted and unrepaired.’ Duguit, n. 62, 132.

⁶⁵ ‘The *dominium* of the individual is no more intelligible as a right than the *imperium* of the Government as the seat of force.’ by Duguit, various authors n. 62, 133.

affirming that '[a] *ominium* and *Imperium* are two legal conceptions from the same source that always move [in] parallel'.⁶⁶

Likewise by 1921 and a propos of the concept of sovereignty Harold Laski argued that, on the one hand, lawyers by mere description of the ultimate source of rights, had described a state 'whose sovereign organ has unlimited and irresistible power' whereas on the other, philosophers have only 'reinforced the legal concept' through teleological justifications and only 'drawing attention to the greatness of the purpose by which the state has been informed'.⁶⁷ To Laski, the conceptual weakness would explain why the legal theory of sovereignty could never offer a basis for a working philosophy of state because from the beginning it takes its stand upon the 'beatification of order; and it does not inquire [...] into the purposes for which order is maintained'.⁶⁸ Eventually, Laski made a call for a new philosophy of the state because in his opinion 'the implied corollary of our purpose [was] the widespread distribution of power'.⁶⁹

Following Bartelson's proposition, I also believe that the history of the concept of sovereignty has to be studied not in isolation or within a narrow temporal frame but in relation to other concepts. In consequence the question is how the very concept of sovereignty rose from the perspective of 'larger discursive wholes'.⁷⁰ Historically, the legal and political expression "sovereignty" comes from Latin and has come to English from the French *soverain* which means 'a supreme ruler not accountable to anyone, except perhaps to God'.⁷¹ According to Ullmann the concept of the ruler's sovereignty *Rex in regno suo est emperor* is a juristic scholarship elaboration which as 'supreme and inappealable governmental power' could only be viewed in terms of Roman emperorship'.⁷²

The concept of sovereignty has two facets, one "internal" which encompasses the notion of 'domestic authority' or absolute local supremacy over all other potential authorities within the state's boundaries. This would encompass three prerogatives: final judicial decision

⁶⁶ Duguit, various authors n. 62, 131 quoting "Le droit social, le droit individuel" Duguit (1911).

⁶⁷ *The foundations of sovereignty, and other essays* by Harold Joseph Laski, Freeport, N.Y., Books for Libraries Press, (first published 1921), 1968, 26.

⁶⁸ N. 67, 29.

⁶⁹ Ibid.

⁷⁰ N. 15, 2.

⁷¹ *Law, power, and the sovereign state: The evolution and application of the concept of sovereignty* by M. Fowler and J. BuncK, University Park, PA: Pennsylvania State University Press, 1995, 4.

⁷² N. 46, 102.

(jurisdiction); the making of law through the legislative power, and; the enforcement of law through the executive power.⁷³ Then, the “external” sovereignty would embrace the idea of independence of states reciprocally seen as relative equals on the international community in the belief that a sovereign state’s rights and duties ‘expresses responsibility as well as authority’.⁷⁴ The latter feature seems to come from the second and third centuries A.D. when the language of pagan Roman Law was assimilated to Christian ideology and the relationship between God and Man began to be conceived of in terms of rights and duties.⁷⁵

The dual and constitutive character of the concept of sovereignty provides ‘an ordering principle for what is “internal” to states and “external” to them’.⁷⁶ This principle has originated in the idea of absolute political power within the society and the principle that no supreme authority exists over and above the collection of communities.⁷⁷ According to Bartelson, the problem with this dual and constitutive character is that it has led to ‘structuration theorists’ (Wendt and Dessler) to turn sovereignty into a basic constitutive rule of the international system withdrawing sovereignty itself from study, leaving it unquestioned.⁷⁸

The sovereign state is a thing “indivisible” whether taken as a whole or in a specific locus within the same state.⁷⁹ From Jean Bodin (1530-1596) onwards, the theory of sovereignty ‘placed the sovereign above the law and made him the sole source of right and wrong in the state’.⁸⁰ The “supreme” reason explains why, in my opinion, Bartelson considers sovereignty ‘*prima facie* incoherent’ since it signifies the political power constituting the law and restraining that very power.⁸¹

Bartelson, as well as Fowler and Bunck, have argued that the rhetoric of sovereignty may be traced back to early philosophers of international law. Jean Bodin, a French philosopher,

⁷³ N. 71, 4 – 14.

⁷⁴ N. 71, 43.

⁷⁵ N. 46, 32.

⁷⁶ N. 15, 17 quoting Giddens.

⁷⁷ N. 15, 16 – 17.

⁷⁸ N. 15, 17.

⁷⁹ N. 15, 138.

⁸⁰ N. 15, 153.

⁸¹ N. 35, 468.

popularised the term in 1576⁸² by his famous statement: “Sovereignty is the absolute and perpetual power of a commonwealth”⁸³ not limited in power, in function, or in length of time.⁸⁴ To Bodin, it is “perpetual” because it persists independently from the people or “trustees of a power that was confided to them for a definite period of time”.⁸⁵ It is “absolute” because it “consists of giving the law to subjects in general without their consent”.⁸⁶

Even though there is some discussion about who were the genuine outliners of the concept, according to Ullmann, the idea of ‘territorial sovereignty’ or internal sovereignty was not firstly developed by Bodin but by John of Paris, Clement V in 1313.⁸⁷ Also that it was Raoul de Presle (1361-64) who developed it in its internal and external aspects.⁸⁸ Moreover, it was Bartolus de Sassoferrato during the fourteenth century who devoted special monographs to ‘political’ problems⁸⁹ by conceiving sovereignty as a ‘classical instance of applying Roman law to contemporary conditions’.⁹⁰ Bartelson suggests that ‘the very term sovereignty was not present within political discourse until Beaumanoir introduced it in the thirteenth century’.⁹¹ Bodin however was the first one to stress the feature of indivisibility and its functions as a mark of individuality of the state in legal terms.⁹² The state becomes the individual and consequently borrows the subliminal Roman attribution of being lord, master, owner and absolute possessor.

Regardless of determining “the” ideologists of the theory of sovereignty, the absolute, perpetual and indivisible sermon, which in the terms of Jacques Maritain (1969) ‘admits no

⁸² N. 71, 21.

⁸³ *On sovereignty: four chapters from six books on the commonwealth* [Jean Bodin. Six livres de la Republique. Selections. English], edited and translated by Julian H. Franklin, Cambridge [England]; New York: Cambridge University Press, 1992, 1.

⁸⁴ N. 83, 3.

⁸⁵ N. 83, 4.

⁸⁶ N. 83, 23.

⁸⁷ N. 46, 290.

⁸⁸ N. 46, 291.

⁸⁹ N. 46, 109.

⁹⁰ N. 46, 109.

⁹¹ N. 15, 88.

⁹² N. 15, 141.

degrees⁹³, still dominates most of political science theory though polished by contemporary discourses of the “rule of law”, respect for human rights and democracy.⁹⁴ According to Fowler and Bunk, it was Hans Blix who stated that the monolithic ‘chunk’ approach of conceiving sovereignty as ownership or as ‘bundle of rights’ has moved from absolute terms to depict it in relative terms as a ‘bundle of competences’.⁹⁵ Thus, by way of example, thanks to this “basket” approach, the “chunk” conception of sovereign immunity rather than being understood as applying to all ‘judicial processes of a foreign state’ is today solely seen in relation to public acts and not private or commercial ones.⁹⁶

The discourse of sovereignty required a concrete political act to emerge. In fact, it is widely agreed that the *Peace of Westphalia of 1648* delineated for the very first time the modern European system of sovereign states.⁹⁷ This particular political act was the starting point of modern international relations which presuppose the existence of “states” or independent political communities asserting sovereignty ‘in relation to a particular portion of the earth’s surface and a particular segment of the human population’.⁹⁸

Deconstructing sovereignty and land ownership

According to Bartelson, the theoretical foundation of sovereignty is conceptualized in logical interdependence with the physical space ‘right from the start’.⁹⁹ Sovereignty is a necessary condition of a bounded territory and, vice versa, a delimited territory is a necessary condition to sovereignty.¹⁰⁰ The significance of space in political theory is vital. The “space” is a physical fact because any human configuration must occupy a piece of it; an environmental fact because it is there where humans find their resources for subsistence; a *theatre* for human

⁹³ N. 71, 66 quoting *The concept of Sovereignty* by Jacques Maritain (1969, 140).

⁹⁴ For a good example of “sovereignty’s aliveness”, see *State, sovereignty, and international governance* edited by Gerard Kreijen, Oxford University Press, 2002.

⁹⁵ N. 71, 71 quoting *Sovereignty, Aggression and Neutrality* by Hans Blix, 1970: 11-12.

⁹⁶ N. 71, 74.

⁹⁷ N. 71, 65.

⁹⁸ N. 15, 23 quoting Hedley Bull, 1977: 8.

⁹⁹ N. 15, 30.

¹⁰⁰ Ibid.

activities and rivalries, and also a geopolitical fact ‘since the sense attributed to space is determined by a particular configuration’ of those relations.¹⁰¹

Correspondingly, the “territory” or the “space” is the premise shared between sovereignty and land ownership. The modern idea of sovereignty might have been conceived from the strong ideology of classical private law, in regards to land ownership, and, the post-classical Imperial Roman law “maxims” of government. According to Ullmann, one of the ‘crucial Roman law notions’ was jurisdiction: ‘the power to fix in a final manner what is right and just, to determine what is the law’.¹⁰² The emperor or *princeps* ‘disposed of the authority to lay down the law for his subjects’. The *gubernator* or governor ‘had jurisdiction from which no appeal lay to any higher court’. The *gubernatio* was essentially the exercise of jurisdiction, and that was the foundation on which the development of political ideas in the Middle Ages rested.¹⁰³

The Christian standpoint, which ‘found its most conspicuous expression in the law’¹⁰⁴, and consequently in the jurisprudence, also played a major role in the development of political ideas in the Middle Ages. Applied Christian doctrine, and its ‘character of indivisibility in regard to thought and actions’¹⁰⁵, fertilised the very idea of supreme (sovereign) power. Thus, it seems that upon the medieval Christian stance, the revival of Roman classical conceptions of law (ownership) and the post classical maxims of *gubernatio*, the theory of sovereignty found fertile ground.

For Imperial Rome and for the Catholic Church of the High Middle Ages, the notional source of all legitimate authority was upward. The so called *descending* theory of government and law understood the “power” to have descended ‘from a transcendental sphere above’.¹⁰⁶ Hence, while the Supreme Being for Imperial Rome was the *princeps* (Latin “first one,” or “leader”), to the wholeness of the Church doctrine which covered all aspects of human life, the Supreme Being, or the source of all original power, was God.¹⁰⁷ The medieval temporal

¹⁰¹ N. 15, 31 quoting Aron R., 1966.

¹⁰² N. 46, 33.

¹⁰³ N. 46, 34.

¹⁰⁴ N. 46, 12.

¹⁰⁵ N. 46, 12.

¹⁰⁶ N. 15, 101.

¹⁰⁷ N. 15, 101.

ruler was believed to receive this power from God and it was the ruler who then, distributed it downwards.¹⁰⁸ This “descending” conception, according to Ullmann and Bartelson, replaced the previous “ascending” theory (the power from the people) which came from Germanic tribes¹⁰⁹, old Roman Republic¹¹⁰ and ancient Greece.¹¹¹ Ulpian ‘referred to *lex regia*, according to which the Roman people had transferred all its powers to the Ruler.’¹¹²

With the descending medieval theory of power the social body was just a passive recipient of its animating force. However, as a result of the penetration (through the Church) of pre imperial law (classical) and, the revival of Aristotelian philosophy, during the 12th and 13th centuries, the theological descending discourse was superseded.¹¹³ With Aristotle’s ideas, that the law-making power was located in the people itself, the ascending theme ‘made its reappearance after centuries of hibernation’.¹¹⁴ The ruler’s legitimacy derived from profane sources. ‘[P]ower and authority flow[ed] from the immanent source of an earthly community’¹¹⁵.

Unlike the descending theory which conceived the medieval *subditus*¹¹⁶, the ascending terminology *politikos* carried the connotation of a ruler circumscribed by the law and the community.¹¹⁷ The notion of “state” is man-made and its purpose is a ‘purely terrestrial one’.¹¹⁸ In fact, to Machiavelli, *lo stato* (the state) was an object of action which cannot act by itself, tied to the agency of a ruler, yet ‘as something existing independently of him’.¹¹⁹

¹⁰⁸ N. 46, 31.

¹⁰⁹ N. 46, 78 ‘Between the mid-twelve and mid-thirteenth centuries Roman law became a source of inspiration, imitation and accommodation, and one of the most conspicuous results was the strong accentuation of the Roman base of government and the concomitant abandonment of the hitherto unquestioned Germanic and customary bases.’

¹¹⁰ N. 46, 56 ‘Through the ascending theory the Roman People who originally possessed imperium voluntarily renounced its own republican powers to the prince.’

¹¹¹ N. 46, 30 – 31.

¹¹² Ibid.

¹¹³ N. 15, 92.

¹¹⁴ N. 46, 271.

¹¹⁵ N. 15, 101.

¹¹⁶ N. 46, 271.

¹¹⁷ N. 15, 102.

¹¹⁸ N. 15, 103.

¹¹⁹ N. 15, 112.

Thanks to Thomas Aquinas the Christian faith was reconciled with the Aristotelian reason, and ultimately allowed the re-emerging of the ascending theory of government. The political animal, the rational citizen, takes part ‘in the shaping of his own community, the State, by creating the law’.¹²⁰ The state was understood, from then onwards, as ‘a body of citizens sufficing for the purposes of life’.¹²¹ Aristotle’s bipolarity of thinking that ‘man and citizen correspond to two different categories of thought’ replaced the Platonic-Christian uni-polar wholeness by distinguishing individuals into political and ethical categories.¹²² In other words, the good citizen is not necessarily a good man, and vice versa the good man does not need to be a good citizen.¹²³

The intrinsic characteristics or the notional suppositions underlying both Roman classical and post classical conceptions of ownership and government, ideologically fed the “baby”, which latter became the canon of medieval thinkers. The medieval scholars nearly reproduced the notions inherited from classical law and from the principles of imperial Roman Law. The difference was their belief in the Christian-God as the only legitimate source of power. For republican Rome the ascending theme was the belief, for imperial Rome the descending theme was the belief. Eventually, the supreme power originated in the medieval “God” is later and again replaced by the “popular” or “terrestrial” modern idea of sovereign power and its “ascending” inspiration.

The Roman Law constituted the most familiar legal corpus for the Anglo-Saxon and continental refined-elitist culture of renaissance Europe. Roman law institutions were, therefore, the most familiar intellectual tool for the fledgling academia. The resurrection of the Aristotelian philosophy occasioned the revival of classical Roman law and consequently the revival of its notions. The revival of the Roman Law occasioned, likewise, the resurrection of German customary bases and its ascending beliefs.¹²⁴

According to Balke, Michel Foucault used to stress that if we want to analyse “power” we have to get away from the inherited legal political theory of sovereignty which dates from the

¹²⁰ N. 46, 270.

¹²¹ N. 46, 269.

¹²² N. 46, 270.

¹²³ Ibid.

¹²⁴ N. 46, 78.

Middle Ages to the emerging absolute monarchies, as a result of ‘the reactivation of Roman law’.¹²⁵ The discourse of sovereignty, Foucault stated, has prevented us from thinking about a power that has long ceased to function according to the model of sovereignty’.¹²⁶ Foucault depicted the genesis of sovereignty ‘as a process of increasing estrangement between the king and his ancestral people’.¹²⁷ The king became a sovereign when he successfully rose above his former people in order to make his position of power invulnerable.¹²⁸ According to Balke, Foucault was a great admirer of Georges Dumézil who drew on the Roman version of the ‘Indo-European system of representing power’, the classic Vedic three order pattern or model of trifunctionality which was represented by the Priest, the Warrior and the Farmer.¹²⁹ The Roman sequence of *Jupiter, Mars, Quirinus* provided the framework to Foucault’s depiction of sovereignty as ‘juridical and magical at the same time’: In the Indo-European system of representing power, power has always had two faces: one juridical through obligations, oaths, commitments, and the other magical function of dazzling and petrifying through power.¹³⁰ Jupiter is an ‘eminently divine representative of power’, the god who binds and ‘the god who hurls thunderbolts’.¹³¹

Foucault explained that “our” history has been *Jupiterian* ‘with the form of discourse emerging at the threshold to the 17th century’¹³² but unlike the Indo-European ternary order the new discourse is bounded by a binary perception of society and men, which is ‘opposed to both organic and bodily models of society’¹³³ and it divides between ‘“...them and us, the unjust and the just, the masters and those who must obey them, the rich and the poor, the mighty and those who have to work in order to live”’ and so on.¹³⁴

¹²⁵ “Derrida and Foucault On Sovereignty” by Friedrich Balke, translated by Bernd Herzogenrath, *German Law Journal* Vol. 6 No. 1 – 1 January, 2005, 80 and 83 quoting “Society must be defended. Lectures at the College de France” by Michel Foucault 1975 – 1976, translated by David Macey 2003.

¹²⁶ N. 125, 80.

¹²⁷ N. 125, 82.

¹²⁸ Ibid.

¹²⁹ N. 125, 83.

¹³⁰ Ibid.

¹³¹ N. 125, 84.

¹³² Ibid.

¹³³ N. 125, 83.

¹³⁴ N. 125, 84 quoting Foucault (1975 – 1976, 47).

From my deconstructive standpoint there are no differences between both western systems of representing power, either ascending or descending. The western indivisibility is notionally present in the conceptions of government and law, namely ascending or descending themes. To Bartelson, the indivisibility ‘hovers between legal fictions either concentrated in the hands of one man or dispersed in the general will or in the consent of majority’.¹³⁵ The state ‘is seen as an individual, in the sense of being indivisible’.¹³⁶ Therefore, and paraphrasing the humanist John Wyclif (1320- 84), if the nation-state is nothing but the citizen writ large¹³⁷ then indivisibility standardizes both conceptions of individual and state and hence via replication the individual concept of ownership intellectually shapes the collective concept of sovereignty.

The underpinnings of the supreme power are, according to Foucault, juridical and magical, at the same time. The western depiction, of the origin of power and the inherent faculties attached to it, belongs to the enigma of absolute supremacy in regards to the governance of the “territorial space”. Ownership and sovereignty are the representation of how some people of western culture understand their relationship with the land. From these premises, the western conception of power arose to become the already denounced (by Duguit and Laski) theoretically out-of-reach theory of sovereignty.

The underlying belief of the theories of government, namely descending or ascending, is the existence of first and untouchable source which is very mystical. “Mysticism” of this kind is not exclusive to western knowledge. In Polynesia, the representation of power did not incarnate as “land ownership” or “sovereignty” but rather it did so by divinizing people and things and excluding them from the rest of the people. The coherent philosophy of *mana* and *tapu*¹³⁸ replaced the western logic of land ownership and sovereignty and also enabled the exercise of power bypassing enforcement agencies.¹³⁹

¹³⁵ N. 15, 26.

¹³⁶ N. 15, 24.

¹³⁷ N. 46, 293.

¹³⁸ *Island at the End of the World. The Turbulent History of Easter Island* by Steven Roger Fischer, Reaction books, London, 2006, 27.

¹³⁹ From this perspective it seems reasonable to think that in any society one of the prerequisites for the stable exercise of power is the existence of coherent philosophies underpinning social beliefs whether called mana-tapu or ownership-sovereignty rationales. Societies without a “philosophy of power” when challenged by limitations of territorial space (or resources) are incapable of sustaining cohesion.

The dichotomous *Zeitgeist*: The Greco-Roman tradition and the distinctions of Roman Law

When and how did the indivisible, absolute, perpetual and exclusive representation of power emerge? Did the Vedic-tripartite and Greek-binary dialectics furnish the Roman concept of ownership with “categorical imperatives”? When thinking of ownership or sovereignty, I wonder what confers on its assumptions the character of maxims. Probably, the answer is “cultural notions” or, paraphrasing Bartelson, the unthought parts of our political understanding are what make the concept of sovereignty intelligible.¹⁴⁰

According to Fukuyama, Hegel argued that human consciousness was limited by the particular social and cultural conditions, of ‘the times’.¹⁴¹ Human history is not just a succession of different civilizations but more importantly a succession of different forms of consciousness namely ways of thinking about fundamental questions, beliefs, and the manner in which men perceive the world.¹⁴² In the same manner, the *zeitgeist* reasoning can be applied to law. According to Stein, the German jurist Von Savigny affirmed that the law grows “by internal silently operating forces, not by the arbitrary will of a law-giver”.¹⁴³ Law therefore would not be a mere construct of reason but a product of the tradition and ethos of a particular society. Each nation’s institution such as language and laws ‘reflect this popular character and should change as society changes’.¹⁴⁴

What we owe to Rome is Roman Law which fairly reflected the spirit of the time which has lasted to the present day.¹⁴⁵ Roman Law not only ‘shaped intellectual habits and created a mode of thinking which was unique in the history of civilization’¹⁴⁶ but also ‘played an important role in the creation of the idea of a common European culture’.¹⁴⁷ Scholarly examination of Roman law was the first academic discipline in the history of Europe

¹⁴⁰ N. 15, 53.

¹⁴¹ *The End of the History and the Last Man* by Francis Fukuyama, London, Penguin, 1992, 62.

¹⁴² N. 141, 62.

¹⁴³ *Roman Law in European History* by Peter Stein, Cambridge University Press, United Kingdom, 1999, 117 quoting Savigny.

¹⁴⁴ N. 143, 117.

¹⁴⁵ N. 143, 1.

¹⁴⁶ N. 46, 53.

¹⁴⁷ N. 143, 1.

beginning between the mid-twelfth and mid-thirteenth centuries.¹⁴⁸ Roman Law became a source of inspiration, imitation and accommodation ‘and one of the most conspicuous results was the strong accentuation of the Roman base of government and the concomitant abandonment of the hitherto unquestioned Germanic and customary bases.’¹⁴⁹

Ullmann argues that it was only in combination with scholarship that Roman Law attained the all-pervading influence which it actually commanded.¹⁵⁰ For example, it was through the writings and teachings of the civilians that the ancient Roman idea of universality became one of the most favoured public law maxims¹⁵¹. ‘The Roman law was to be the general and basic norm applicable to all mankind’¹⁵² but most importantly ‘the civilians’ theses formed a bridge to the late medieval and modern conception of sovereignty possessed by the lay Ruler.’¹⁵³

Although Romans were not interested in the philosophy of law they imported the Hellenic tradition to shape their law. According to Jolowicz, the Hellenistic ‘dialectical method’ involved the division between ‘subject-matter into parts, and the distinction of *genera* and *species*’.¹⁵⁴ Cicero thought that the ‘law might be reduced to an *ars*, and even wrote a book on the subject.’¹⁵⁵ In his ‘rhetorical treatises’ he commonly distinguished between persons and things.¹⁵⁶ Thus, according to Jolowicz, the historical origins of the tripartite Roman-Gaius division of law, was, apparently, originated in Greece through Cicero or more specifically from the Hellenistic model¹⁵⁷. According to Stein, under the influence of Greek methods of classifications, the hitherto casuistic Roman Law was systematised for the first time at about 100 BC¹⁵⁸, but it was not until the middle of the second century AD when ‘a major advance was made in arranging the substance of private law.’¹⁵⁹ From the 11th century the Justinian

¹⁴⁸ N. 46, 79.

¹⁴⁹ N. 46, 78.

¹⁵⁰ N. 46, 79.

¹⁵¹ N. 46, 89.

¹⁵² N. 46, 90.

¹⁵³ N. 46, 92.

¹⁵⁴ *Roman foundations of modern law* by Herbert F. Jolowicz, Westport, Conn.: Greenwood Press, c1957, Reprint of the ed. published by Clarendon Press, Oxford, 1978, 65.

¹⁵⁵ N. 154, 65.

¹⁵⁶ N. 154, 66.

¹⁵⁷ N. 154, 64.

¹⁵⁸ N. 143, 18.

¹⁵⁹ N. 143, 19.

Corpus Iuris Civilis came to be the main ‘source of rules and arguments in western Europe.’¹⁶⁰ It declared that ‘the whole of our law relates either to persons or to things or to actions.’¹⁶¹ The second category, “things”, included anything to which a money value could be attributed¹⁶² and comprehended both ‘*res corporales*, things which could be touched (a table, a house or a piece of land) and *res incorporales* or abstract things, things which could not be touched’¹⁶³ which only exist in the mind’s eye (eg. a debt, a right of way).¹⁶⁴

Based on the ‘physical quality of mobility’ of the thing, *res corporales* or physical things can be further divided into *immovables* and *moveables*.¹⁶⁵ This classification distinguishes land, its natural productions (trees and fruits hanging upon their trees) and the buildings (permanent structures erected upon land) which go with it, from all other property.¹⁶⁶ Movable things were those which ‘from their nature are not stationary and therefore can be carried away, including animals which move themselves.’¹⁶⁷ From classical Roman Law, the distinction between land and other forms of property became prominent. Although modern legislation had established particular variants for practical uses, the binary essence and its characteristics are still ‘strongly maintained’ in two separate species of property.¹⁶⁸

The distinction between *public* and *private* law, attributed to Ulpian (228 A.D.) also became a prominent feature in the “Justinian Law”.¹⁶⁹ In continental Europe and Latin America it remains of fundamental importance. Public law was concerned with the functioning of the state including constitutional and criminal law and, Private law was concerned ‘with relations between individuals.’¹⁷⁰ Later it came to delimit the spheres of several codes being the base

¹⁶⁰ N. 143, 43. During the eleventh century, the ‘Justinian law’ was rediscovered and began to be used in Western Europe ‘as a source of rules and arguments.’

¹⁶¹ *An introduction to Roman law* by Barry Nicholas, Oxford University Press, 1962, 60.

¹⁶² N. 143, 19.

¹⁶³ *An introduction to The Civil Law* by K. W. Ryan, Halstead Press, Sydney, Brisbane, Law Book Co. of Australasia, 1962, 142.

¹⁶⁴ N. 161, 98.

¹⁶⁵ N. 163, 142.

¹⁶⁶ N. 161, 105.

¹⁶⁷ *The principles of Roman law and their relation to modern law* by William L. Burdick, Holmes Beachs, Fla.: Gaunt & Sons, Facsimile reprint, Originally published: Rochester, N.Y.: Lawyers Co-operative Publishing Co. (c1938), 1989, 314.

¹⁶⁸ N. 163, 142.

¹⁶⁹ N. 154, 49.

¹⁷⁰ N. 161, 2.

of the continental modern doctrine of the separation of powers and law.¹⁷¹ Public law dealt with matters affecting the administration of government and connected with political power, sovereign dominion ‘and regards the welfare of the State’.¹⁷² Private law instead dealt with matters relating to the interests of individuals namely private ownership or the dominion of a private owner as distinguished from public ownership or public rights.¹⁷³

For my deconstructive purposes, there are no differences between the distinction since Ulpian’s “public law maxims” are only fair representations of the Roman *zeitgeist* of (absolute, exclusive, perpetual, indivisible) supremacy. The implicit notions upon which Ulpian drew are just replicas of Roman *dominium*. The Ulpian’s maxims were basically: *jurisdiction*, the law-creative power; *imperium* ‘the sum-total of unappealable governmental’ or ‘the supreme power to lay down the law’¹⁷⁴, and *constitutions* or the ‘binding rules created by the Ruler.’¹⁷⁵ Ulpian’s statements of “what pleases the prince, has the force of law” and “the prince was not bound by the laws”¹⁷⁶ fairly depict the personal sovereignty of the Ruler (the *descending* theme) by which the *princeps* forms an estate of his own being ‘the source of the law and therefore stood outside and above the people.’¹⁷⁷ According to Ullmann, the Law of Rhodes (contained in the Justinian Code too) proclaimed that Roman emperor was *dominus mundi* and the ‘lord of the world.’¹⁷⁸ This was not only a statement of legitimacy but also of superiority over all other kings and rulers.¹⁷⁹

To sum up, the *imperium* of the ruler became, just a large-scale duplication of the Roman land-owner’s *potestas* (powers, faculties). To grasp the complexity of the relationship between people and land, Roman jurists recreated, through maxims, the underlying existing notion of supremacy established through the law of property.

¹⁷¹ N. 154, 51.

¹⁷² N. 167 181.

¹⁷³ N. 167 182.

¹⁷⁴ N. 46, 56.

¹⁷⁵ N. 46, 57.

¹⁷⁶ N. 46, 57 quoting Ulpian.

¹⁷⁷ N. 46, 57.

¹⁷⁸ Ibid.

¹⁷⁹ N. 46, 58.

The Roman concept of individual ownership in modern civil law: the human will and univocal possession

To classical Roman Law, *proprietas* or *dominium* was ‘the mastery or the absolute control over a thing except as one may be restrained by law.’¹⁸⁰ Ownership was simply the difference between mine and thine, the ultimate right, the right behind all other rights.¹⁸¹ Ownership involved total rights over a thing, in the sense of the most comprehensive rights over the thing which the positive law admits, the so called *plena in re potestas*. Roman ownership was indivisible.¹⁸² A man was either owner or not owner. His title must be good against the whole world or against no one. The owner was entitled to use the thing (*ius utendi*), to enjoy its products up to its entire consumption (*ius fruendi/abutendi*) and also the owner had the right to dispose of it absolutely (*ius disponendi*) or alienate it at will.¹⁸³ The absoluteness concept also comprehended that ownership was not the better of competing rights but the best right, the only one of its kind.

The idea of absoluteness underlies the law in France, Germany and Chile. To the French Civil Code (Art. 544) ownership or *propriété* ‘is the right to enjoy and dispose of things in the most absolute manner, subject to the laws and regulations in force’. In German law (Art. 903 B.G.B.) the owner or *eigentümer* ‘in so far as the law and the rights of third parties permit, deals with the thing as he pleases and restrain others from interfering with it.’¹⁸⁴ According to article 582 of Chilean Civil Code¹⁸⁵, *dominio o propiedad* ‘is the real right over a corporeal thing to enjoy and dispose arbitrarily of it, not being against the law or another’s right.’¹⁸⁶

Thus, modern ownership is inviolable since ‘a man cannot lose ownership without his consent.’¹⁸⁷ Whoever is recognised as owner will therefore be the only person entitled to the

¹⁸⁰ N. 167 325.

¹⁸¹ N. 167 153.

¹⁸² N. 161 127; also N. 143 62 and 82.

¹⁸³ N. 167 325.

¹⁸⁴ N. 163 159.

¹⁸⁵ The Chilean Civil Code redacted by the Venezuelan Andres Bello became to be a ‘model’ for the rest of South American Civil Codes.

¹⁸⁶ Article 582 of the *Código Civil Chileno* in URL: <http://www.bcn.cl/leyes/pdf/actualizado/172986.pdf>

¹⁸⁷ N. 161, 157. The only exception of this principle was prescription.

totally of rights which ownership entails.¹⁸⁸ To Ryan, ‘the exclusive character of the right of ownership is a cardinal principle both of later Roman law and the present civil law.’¹⁸⁹ To Planiol and Ripert, who were the “ideologists” of the French Civil Code, a thing ‘could not belong in its totality to two persons’¹⁹⁰ and only one person can be an owner.¹⁹¹ This is the exclusive and individual character of *dominium*, the attribution to a single person of the ownership of the thing itself.¹⁹²

By reinforcing Roman insights, the cultural representations of *dominium* and *imperium* permeated modern philosophies. In this regard, the idea of “Roman *possessio*” might have played a major role. According to Stein, Savigny insisted on a particular mental and physical relationship between the possessor and the thing possessed as having general application to all developed legal systems.¹⁹³

According to Watson, “Roman *possessio*” was the physical contact over a thing, which one exercises either directly or through another person.¹⁹⁴ A person acquired possession when he firstly ‘had sufficient physical control over the thing’ or *corpus* and secondly when he had *animus* or ‘the requisite intention’¹⁹⁵ to control it by exclusion of others. Savigny believed that the ‘central principle of possession’ was a manifestation of the human will.¹⁹⁶ Moreover, according to Burdick, during the earliest times of Roman society ‘ownership was associated with the thought of power, physical power.’¹⁹⁷ Violence and force were the common modes of getting and retaining what one desired.¹⁹⁸ Therefore, in my opinion, the *conscious*-primitive desire of “retaining” things via physical power, violence and exclusion of all others, underpinned the later *unconscious*-civilized idea of classical Roman Law: the safeness given by the protection of ownership via absolute and invulnerable legal barriers.

¹⁸⁸ N. 163, 160.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ N. 163, 158.

¹⁹² N. 163, 162.

¹⁹³ N. 143, 125.

¹⁹⁴ *The Law of Property in the later Roman republic* by Alan Watson, Oxford Clarendon Press, Oxford University Press, London, 1968, 81.

¹⁹⁵ N. 194, 81.

¹⁹⁶ N. 143, 120.

¹⁹⁷ N. 167, 330.

¹⁹⁸ N. 167, 330 quoting *History of Roman Law* by Ortolan (1896: 532).

Rationalism, codification, individualism and property

By the end of the 17th century Roman-civil law, had already permeated the protestant culture of northern Europe.¹⁹⁹ During the 17th and 18th centuries ‘the new rationalism of the school of natural law’ appears ‘believing that the law for any society could by the use of reason be derived from principles inherent in the nature of man and society’.²⁰⁰ Natural law ideas led to the codification movement to replace ‘irrational’ Roman Law features with logic in law, that is, a set of consistent principles and rules systematically arranged into a single system of written codes.²⁰¹ The efforts towards codification were inspired as well by the belief that the ancient regime must be overthrown and replaced by another ‘founded upon rationalistic principles.’²⁰² The rationalist natural law philosophy proclaimed that a complete set of laws could be simply and rationally stated and that the existing complexities were to be eliminated.²⁰³ The Roman Law ‘was caught up’ by the codification movement, under the umbrella of the intellectual movements of the Enlightenment.²⁰⁴ This also brought a second life for Roman Law by replacing it with the civil law or the successor of the continental common law (*droit commun*). The codification gave to Roman Law ‘a new life’ and extended it to territories into which it could never otherwise have entered.²⁰⁵

The aim pursued by 19th century philosophers, ultimately, was to allow ‘maximum freedom to the human will’²⁰⁶ or under Savigny’s interpretation, to allow the free expression of the principle of Roman possession. The predominant philosophy of the 19th century was inspired by individualism²⁰⁷ and the consequence is to grant the greatest possible liberty to the individual. Individualism was to govern not only relationships between individuals and the State but also between individuals themselves.²⁰⁸ This approach is intelligible since the

¹⁹⁹ N. 143, 101.

²⁰⁰ N. 161, 50.

²⁰¹ N. 161, 51.

²⁰² “Dominant legal ideas in the first half of the 19th century after the French revolution” by Alexander Alvarez in various authors n. 62, 7.

²⁰³ N. 143, 110.

²⁰⁴ N. 143, 110.

²⁰⁵ N. 161, 52.

²⁰⁶ N. 143, 119.

²⁰⁷ Alvarez in various authors, n. 62, 5. ‘Man was always imagined living isolated, without relation to his fellow beings, and enjoying, in a state of nature, an almost absolute liberty. Human relations existed only by the will of individuals, not by virtue of ties uniting them to another.’

²⁰⁸ Alvarez in various authors, n. 62, 11.

previous centuries were characterized by royal despotism, inequality in personal status and land ownership, obstacles to industrial freedom, commerce and industry. Reasonably, social philosophers strove to set up the conception of individual and property as bases of social organization and law.²⁰⁹ As to the Romans, the 19th century scholars distinguished between public and private law. The former they desired to entirely reconstruct from pure reason. The new foundations were constituted by ‘the unrestricted and private right of property (unburdened by all feudal charges²¹⁰), the guarantees of the rights of man, the sovereignty of the people, and, the separation of the powers of government.’²¹¹

In the case of private law, liberty of the individual was still the ideal but delimited by rules by which ‘the liberty of each could co-exist with the liberty of all’.²¹² They resolved the intellectual overlap caused by the interaction of both absolute individual and collective principles by saying that individualism ‘was in no wise inconsistent with the recognition of the supreme power of the State, which was regarded as sovereign merely in order to assure to each citizen a maximum of liberty’.²¹³ On the basis of individualism the modern ‘law of property looked upon (a) the will of the individual as autonomous, (b) his activities as free and (c) the rights acquired voluntarily and freely by an act of his will as inviolate.’²¹⁴ The right of ownership was proclaimed as *absolute, exclusive, and perpetual*.²¹⁵ Absolute because on the one hand the owner ‘could partition the land at will, and work it or not at his pleasure’²¹⁶ and on the other hand due to the right to transmit property by will, the owner or title-holder had the power to dispose of ‘his property both during his life and also for a time after his death.’²¹⁷ Then, such rights were exclusive, because no one could acquire his title against his will, or effect a dismemberment of it, no matter how great the advantage that might accrue thereby to society.²¹⁸

²⁰⁹ Alvarez in various authors, n. 62, 5.

²¹⁰ Alvarez in various authors, n. 62, 11.

²¹¹ Alvarez in various authors, n. 62, 6.

²¹² Ibid.

²¹³ Alvarez in various authors, n. 62, 7.

²¹⁴ Alvarez in various authors, n. 62, 20.

²¹⁵ Alvarez in various authors, n. 62, 21.

²¹⁶ Ibid.

²¹⁷ Duguit in various authors, n. 62, 32.

²¹⁸ Alvarez in various authors, n. 62, 21. However for certain cases, as legal servitudes or compulsory partition, the French Civil Code established that the general interest was to be preferred to private interests.

The Polynesian dichotomy: The “loose” possessive

At the beginning I affirmed that Easter Islanders are bearers of non-Roman legal conceptions. This, however, does not clear up the complexity of historical process, nor does it explain how such phenomena may survive despite centuries of colonial intervention. These anthropological questions will not be answered here. The argument here is that the existence of “notional elements” are unrecognised components on which the Polynesian paradigm, underpins its conscious structure.

During the 20th century, Saussure in linguistics, Levi-Strauss in anthropology and Jacques Lacan in psychiatry, depicted cultures as ‘systems’ and universal cultural patterns as products of the invariant structure of the human mind and even determinant of kinship relations, beliefs, art, religion and tradition.²¹⁹ By assuming that the structure of mind, common to mankind, drives basic discernment and even universal values and that the Hegelian historical-process determines the cultural distinctiveness, understanding and knowledge, the language or the ‘mirror of the mind’²²⁰ comes to be, ultimately, just a patent representation of people thoughts. Consciousness would be constrained, not only by environmental and biological needs, and linguistic appreciations, but also, by historical circumstances. All those factors, altogether, mold the human psyche progressively, in order to build distinctive knowledge and different appreciations of reality.

Three mutually geographically isolated Polynesians cultures, namely Marquesas Islands, Hawai’i, and Rapanui, had, and maybe still have, two distinguishing possessives. Unlike western univocal-possessive and its resulting unilinear-possession, “the” Polynesian linguistic possessive distinguishes between two different forms of possession or apprehension. One, is intimate/ strong/ inherent/ inalienable/ near, and; the second form is accidental/ contingent/ acquired or distant in relationship with people or objects.

In Hawaii, according to Trask, Hawaiians distinguish between “inherent” and “acquired” status of possession. On the one hand, there is a *ko’u* which denotes inherent status such as my body, *ko’u kino*; my parents, *ko’u mákua*; or my land, *ko’u áina*. And, on the other hand, there is a *ka’u* which denotes an acquired status in relation to ‘most material objects’, such as

²¹⁹ *Encyclopedia Britannica Online* “Structuralism” URL: <http://www.search.eb.com/eb/article-9070003>

²²⁰ *Reflections on language* by Noam Chomsky, New York, Pantheon Books, 1975, 4.

food *ka'u mea'ai*. Hawaiians 'show possession in two ways: through the use of an "a" possessive, which reveals acquired status, and through the use of an "o" possessive, which denotes inherent status.'²²¹

In the Marquesas Islands, according to Thomas, 'like other Polynesian languages, Marquesan had two series of possessives, one *to'u* expressing an intimate, strong or inalienable relationship between object and possessor which would be used in relation to land, parts of the body, certain classes of inherited personal property, etc.'²²², whereas *ta'oe* 'implies a more accidental, loose, or contingent relationship with the land and also with bought or otherwise acquired property.'²²³

In Rapanui, according to father Englert, there are two kinds of possessives. *Tookeu* which refers to 'objects which in the native's feeling are closer', such as the body, dresses, thoughts, the house, the horse, watercraft, the land, and lineal ascendants. And, on the other hand, *taaku* which refers to distant objects in the possessor's feeling such as husband, wife, offspring, dog.²²⁴

All the *possessives* psychologically differentiate between the "strong" or "weak" relationship with the object. The relationship with land, through the "o", belongs to the inherent and inalienable relationship. Metaphysically, the land would not belong to the self by univocal-possessive and unilinear-external attachment but the self and the land reciprocally share a sense of belonging.

The linguistic logic makes intelligible to westerners what for them was the unusual reasoning of not considering land as a commodity but, on the contrary, an inalienable human feature, as the "o"-body. According to Trask, Hawaiians pre-contact 'could not own or privately possess the land any more than they could sell it.'²²⁵ According to Chief Judge Durie, to

²²¹ Trask n. 45, 116.

²²² *Marquesas Societies. Inequality and Political Transformation in Eastern Polynesia* by Nicholas Thomas, Oxford Clarendon Press, New York, USA, 1990, 202, note 14, chapter 3. 'A kai 'oe 'i te henua nei, e kai anaiho ta'oe, avai te henua to'u. The French missionary translation was 'Je vous donne l'usage de cette terre, mais je m'en reserve la propriété' Tryon D.T., 1970, Conversational Tahitian. Thomas' translation: 'you eat this land, you merely eat it, I keep the land for myself.' Dordillon Dictionnaire, 418, quoted by Thomas n. 222, 52.

²²³ N. 222, 52 and 202.

²²⁴ *La Tierra de Hotu Matu'a. Historia y etnología de la Isla de Pascua. Gramática y diccionario del antiguo idioma de Isla de Pascua* by Sebastian Englert, Novena edición. Editorial Universitaria, Santiago de Chile, (c1968), 2004, 292.

²²⁵ Trask, n. 45, 115.

Maori people ‘the land was not a marketable commodity but held as an ancestral trust.’²²⁶ According to these depictions the Roman power of *ius disponendi* was unimaginable, in the sense that nobody was entitled to sell or buy the land but only to use it.

The “loose” Polynesian ownership and the Maori “flexible” law

The following quotations from relevant ethnography show implicitly the loose and flexible character of the possessive and the law, respectively.

According to Williamson, ‘Samoans clung to the system of common interest in each other’s property with great tenacity.’²²⁷ Not only a house, but a canoe, a boat, a fine, a dowry... tools, garments, money etc., were freely lent to each other, provided they were connected with the same tribe or clan. ‘If a man possessed that for which he was asked, he would either give it or tell the lie, either that he had it not, or that he had promised it to some one else.’²²⁸ ‘The community of property, especially of food, was most noticeable. Everything appeared to belong to everybody –that is, if it were asked for [...]’²²⁹ ‘[S]tealing from the plantation of a relative was not considered wrong, and in fact was not called stealing; it was simply a part of a communistic system under which no man could rise above the level of his fellows.’²³⁰

In Tahiti, ‘a man divided everything in common with his friend, and the extent of the word friend was, by them, only bounded by the universe.’²³¹ In Huahine, French Missionaries proposed a law ‘concerning the protection of private property [which] was submitted to with reluctance’²³². ‘Tahitians were accustomed to share a part of their food with every one about them...’²³³ The Tahitian word ‘*aiata*’ means either to eat another’s food or to take his property without leave or consent. The Tahitian word *hamumu* means to be burdensome to

²²⁶ N. 33, 62.

²²⁷ *The social and political systems of central Polynesia* by Robert Wood Williamson, Oosterhout, Anthropological Publications, Vol. 3, Reprint of 1924 edition, distributed in the U.S.A. by Humanities Press, New York, 1967, 236 quoting Turner.

²²⁸ N. 227, 236.

²²⁹ N. 227, 236 quoting Churchward.

²³⁰ N. 227, 236 quoting Brown.

²³¹ N. 227, 270 quoting Hamilton.

²³² N. 227, 270 quoting Crook.

²³³ N. 227, 271 quoting Turnbull.

others by eating their food. The Tahitian word *taia* means to die from supposed effect of eating without giving to the neighbours.²³⁴ According to Williamson, ‘community of ownership of private property prevailed to a greater or less degree in the Society Islands, as it did in Samoa and Tonga.’²³⁵

In Rapanui, according to Metraux, ‘the fields were planted and the crops harvested in common by the members of a household or by the people living at the same place [lineage].’²³⁶ The workers were rewarded with a feast or *hatu*. To Metraux, it was impossible ‘to determine what system of property was applied as regards poultry because on the one hand, ‘hens undoubtedly had a great value and were used for exchange’, but on the other hand ‘today everyone gives freely of his clothes and of cooking and tilling implements’.²³⁷ He added, ‘between relatives there is a constant exchange of gifts conforming to patterns of reciprocity’.²³⁸ ‘Children are permitted to use anything they need from the houses of either their paternal or maternal relatives.’²³⁹ Then, he affirmed that ‘the few boats on Easter Island are joint property of all those who have contributed to their building, either in work or in furnishing wood.’²⁴⁰

Also on Rapanui and according to Routledge’s depictions, ‘the absence of security of property was perhaps the greatest barrier to native progress.’²⁴¹ From her western standpoint she observed that Easter Islanders ‘steal freely from one to another, as well as from white men, so that all individual effort is rendered nugatory.’²⁴² At the same time, she observed, ‘they are curiously lacking in pugnacity, and if detected in theft quietly desist or return the property...’²⁴³

²³⁴ N. 227, 271 quoting Davies’s dictionary.

²³⁵ N. 227, 271.

²³⁶ *Ethnology of Easter Island* by Alfred Metraux, Bernice P. Bishop Museum Bulletin; 160. Honolulu, Hawaii, 1940, 144.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ *The mystery of Easter Island: the story of an expedition* by Katherine Routledge, London: Printed for the author by Hazell, Watson and Viney: Sold by Sifton, Praed, 1920, 141.

²⁴² N. 241, 141.

²⁴³ Ibid.

Routledge's depictions coincide with those made by La Perousse more than hundred years before. La Perousse was one of the first Europeans to land on *Te Pito O Te Henua*. He observed that Easter Islanders were avid for sailors' hats, handkerchiefs and, in general, for every species of animals that the crew left on the island. The only exception to this were their 'muskets' which 'they returned a few minutes afterwards, renewed their caresses, and watched a favourable moment to commit new thefts.'²⁴⁴

In Aotearoa/New Zealand, according to Eddie Durie, Maori society yet widely accepted rights of property only a few possessions were not held in common, and;

[...] it was not unethical to try to advance one's fortunes, or those of one's kin, by tricky conduct. It was more shameful to be caught out or demonstrably to fail [...] Thefts were occasionally committed in a spirit of boldness and daring, offenders readily admitting their actions [...] With the exception of heirlooms and personal ornaments, personalty was not so much owned as imbued with the mana of those who expended labour on it, and a number of kin might feel entitled to access the object because of their connections with the persons concerned or with the figures associated with the ornamented carvings [...] Few would dare to touch the possessions of a high ranking rangatira however [...] Powerful people deliberately broke rules to prove that they were strong and possessed of great mana.²⁴⁵

According to Durie, Maori pre-contact institutions and the dynamics of custom and oral tradition were flexible, fluid, plastic and adaptable.²⁴⁶ Central to Maori self-identity was *whakapapa* (genealogy) which worked for *mana tupuna* (ancestors) ideology where 'all things came from ancestors, land rights, status, authority, kinship, knowledge, ability.'²⁴⁷ Maori *tikanga* (law) or the Maori principles of justice did not operate by finite rules alone but by reference to principles and values not necessarily achievable.²⁴⁸ Without reference to institutional organs or super-ordinate authority, *tikanga* was pragmatic, flexible and not bounded by rigid rules but subject to reinterpretation according to circumstances.²⁴⁹ 'The

²⁴⁴ *The voyage of La Pérouse round the world, in the years 1785, 1786, 1787, and 1788, with the nautical tables* by Jean-François de Galaup, Comte de. Arranged by M. L. A. Milet Mureau, to which is prefixed, narrative of an interesting voyage and annexed, travels over the continent, translated from the French, illustrated in two volumes, Vol. 1, London, 1798. 2 vols. based on information from English Short Title Catalogue, Eighteenth Century Collections Online, Gale Group, URL <http://galenet.galegroup.com/helicon.vuw.ac.nz/servlet/ECCO>, 1798, 67.

²⁴⁵ N. 33, 54 – 55

²⁴⁶ N. 33, 1.

²⁴⁷ N. 33, 7.

²⁴⁸ N. 33, 3.

²⁴⁹ N. 33, 4.

Maori legal conception was thus values orientated not rules based²⁵⁰ and custom ‘served to guide, not bind’ because ‘rules were not as important as their origins and purpose, and decision making was based on pragmatic needs of survival.’²⁵¹ ‘The adherence to principles, not rules, enabled change while maintaining cultural integrity.’²⁵²

According to Keenan, Maori customary law was characterized by the absence of ‘enforcement agencies’ (Courts, Army).²⁵³ Although practices varied, from place to place, the nature of power in Maori pre-contact society was ‘spread’ and ‘diffused’ in the sense of decision making. He affirms that Maori traditional society operated by reference to principles, goals and values which, not always achievable, were defined by the *tikanga*. The Maori worldview depended upon being connected. Mental constructs were cycles not lines and nothing existed in isolation. The society was shaped by principles which were always attributed to ancestors. The colonisation however marked the beginning of ‘static customs’ as well as the sense of ‘right and wrong’. With the influence of Christianity, Maori practices of tattooing, dancing, polygamy, warfare, *muru* (or ‘plunder to appease offences [...] or to appease a breach of tapu or taking of mana’²⁵⁴) etc... became acceptable or unacceptable according to those Christian principles.

The *Mana* and *Tapu* philosophy: The implicit coercion

In legal terms, the “flexible” character of Maori customary law and the Polynesian “lax” sense of ownership (permitted by the “loose” linguistic possessive) are related to the philosophy of *mana* and *tapu*. Social control’s sustainability did not depend on enforcement agencies or *imperium* but in the metaphysical faith of believing in exceptional representations of power and control. In western societies the equivalent to this is the *auctoritas* of law.

Also, the philosophy of *mana* and *tapu* is perhaps comparable to the *Foucaultian* facets of “power”: one ‘juridical’ by obligations, oaths, and other ‘magical’ of petrifying through power.²⁵⁵ The ideology of *mana* and *tapu* could have fulfilled the role played by the juridical

²⁵⁰ N. 33, 8.

²⁵¹ N. 33, 9.

²⁵² N. 33, 8.

²⁵³ Personal notes 24th July, 4th August 2008 from n. 39.

²⁵⁴ N. 33, 52-53.

²⁵⁵ N. 125, 83.

and magical notions which still seem to underpin western beliefs. What the *mana* and *tapu* ideology and the *descending* and *ascending* theories of law and government have in common is the juridical and magical role they play.

Mana was “supreme” though it depended on the ability of the community to sustain it through the appropriateness of each established *tapu*. To Maori, ‘power was the product of *mana*, not of institutionalised structures’²⁵⁶. Maori customary law was not respected because of its *imperium* but by reason of its *auctoritas*. Without institutions to enforce the law, the lax legal understanding needed to have something mystical or morally transcendental to attract people. Law needs to be respected to be considered as such otherwise is not law but just an unfixed social convention. *Mana* and *tapu* gave to customary law the necessary authority to keep the body of rules coherent. To a greater or lesser degree, depending on local variations, these two basic constraints gave *auctoritas* and brought people together under the customary law, whatever its worthiness.

In Maori society ‘mana described the personal and political dimensions of Maori authority...’²⁵⁷ ‘The individual of whatever class or caste gained or regained mana through personal achievement and ability for the benefit of others.’²⁵⁸ *Mana* was not absolute. Therefore, the *rangatira*, or political leader, of the *hapu*²⁵⁹ could increase, reduce or lose his *mana* according to his success or failure.²⁶⁰

According to Fischer, ‘only high-ranking individuals (and not everyone, as Durie states) possessed *mana* –that is, socio-spiritual power– which ultimately derived from ancestors.’²⁶¹ Moreover, ‘to maintain uncontaminated *mana* and ensure continued success, very early Polynesian society devised a ritual restrictive complex or *tapu*.’²⁶² ‘*Tapu* affected use of land, crops, buildings, precincts and the sanctity of individuals’. *Tapu* also ‘affected the behaviour, speech, diet, sexual practices, beliefs and attitudes’ by embracing a way of thinking deeply rooted in Polynesian societies. *Tapu* were not just rules over persons and things but ‘a

²⁵⁶ N. 33, 40.

²⁵⁷ N. 33, 5.

²⁵⁸ N. 33, 40.

²⁵⁹ The essential political units for local governance and social intercourse.

²⁶⁰ N. 33, 16.

²⁶¹ N. 33, 27.

²⁶² N. 33, 27.

philosophy of life'. *Tapu* 'was rigorously enforced social code against which the positions and actions of each member of the island community were daily defined.'²⁶³

According to Durie, nonetheless, there were not only *mana* and *tapu* but also other 'conceptual regulators' to control the behaviour of Maori people.²⁶⁴ Resources and *rangatira*'s possessions could be protected by *tapu*, imposed by the *tobunga*²⁶⁵ or declared by a *rangatira* whose *mana* was *tapu* as well.²⁶⁶ The belief was so intense that Maori people attributed some physical and mental illnesses to breach of *tapu*.²⁶⁷

In the Marquesas Islands '*tapu* was a hierarchical system which disabled some actors and constantly reordered associations with products.'²⁶⁸ The extension of *tapu* created an indissoluble association between a thing and a person by constituting notions of ownership and prestations.²⁶⁹ Objects which accidentally became *tapu* were generally abstracted from common use and put in such places as the roofs of *tapu* houses.²⁷⁰

During the early pre-contact era in Rapanui, the person and residence of the *ariki mau* was considered *tapu*. According to Englert, the *ariki mau* was a loose king who held limited political power over all the various larger kin-groups²⁷¹. Nobody could even touch the *ariki*'s body and hair.²⁷² By controlling a supernatural authority on the island, the *ariki mau* was respected for being a repository of *mana*.

Common or collective ownership: The misunderstanding

²⁶³ N. 138, 27.

²⁶⁴ N. 33, 6.

²⁶⁵ N. 33, 31. *Tobunga* or experts or 'specialist in a discipline'.

²⁶⁶ N. 33, 53-54.

²⁶⁷ N. 33, 52.

²⁶⁸ N. 222, 85.

²⁶⁹ N. 222, 84.

²⁷⁰ Ibid.

²⁷¹ *Island at the Centre of World. New Light on Easter Island* by Sebastian Englert, translated and edited by William Mulloy, Charles Scribner's Sons, New York, 1970: 30; also 'Social groups and Social categories' in *Rapa Nui Precontact: Custom Law Comparisons with Aotearoa* by Rodrigo Gomez URL <http://www.nzetc.org/tm/scholarly/tei-Bid001Kahu-t1-g1-t2.html>

²⁷² N. 138, 22.

From a specific legal perspective, I have been arguing that the classical depiction of Polynesian “land tenure” or the “clan system” misinterpreted the legal nature of the phenomenon. It assumes that the pre-contact understanding must be tackled in terms of “common ownership” which is a form of “co-property”. Naturally, the *dichotomic* Greek-Roman cultural heritage leads to contrasting common to individual property and vice versa.

According to Ryan, the phenomenon of co-ownership occurs when an ‘undivided *res* is held by several co-owners.²⁷³ The right of ownership is divided among the co-owners or among the subjects of the right whilst the object itself is undivided. Each one has a fractional interest in it. ‘Although the civil law refuses in accordance with Roman law to detach ownership from the object owned, it does introduce a notional concept when an object is owned by more than one proprietor.’²⁷⁴ The right of ownership is divided among the subjects of the right whilst the object itself is undivided.²⁷⁵

The legal idea is exceptional since understand that an “undivided” strip of land may, abstractly, be shared amongst individuals. The contrast between common and individual emerges from the indivisible, absolute and exclusive character of the individual ownership. Indeed, both classifications draw on the individual as the centre of analysis. The land remains undivided but the rights over it do not. Then, the concept of common ownership supposes an exceptional and temporal state, not a perpetual one, because in the end, every “owner” may dispose of his share at will and, the “community of owners” is, ultimately, meant to come to an end, be concluded, finished or abandoned.

To the Romans ‘the rights of co-owners [were] conceived as shares of the individual mass.’²⁷⁶ The Roman Law co-owner ‘can dispose freely of his shares even without the consent of his associates.’²⁷⁷ Apparently, in contrast, the Civil law mitigated the Roman principle when stating that each co-owner is at liberty to dispose, as he pleases, but he cannot dispose without the consent of the other co-owners²⁷⁸. There is no contradiction however since the co-owner’s power is intact. Indeed, it is exercised when compulsory repartition is requested

²⁷³ N. 162, 163.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ N. 162, 164.

²⁷⁷ Ibid.

²⁷⁸ N. 162, 163.

by “the rebel” to the rest. According to French Civil Code (art. 815) and German Civil law (art. 749 BGB), common ownership is regarded as essentially a temporary state, and at any moment a co-owner can put an end to it by claiming partition.²⁷⁹ Thus, we can see that the absolute and indivisible character does not disappear through the common ownership or co-ownership but, it is in fact confirmed.

After the Chilean annexation of Rapanui on September 9 1888, the agent of colonisation, Pedro P. Toro, who stayed on the Island for four years (1888 – 1892) made ‘the first assessment of Rapanui land ownership seen through the eyes of a Chilean who had first-hand knowledge of the situation.’²⁸⁰ According to Delsing, even though “Toro had no insight into the Polynesian system of land tenure, which allowed for collective use of clan lands and he may not have been aware of the existing clan system’ he described a situation very similar to others observed in the rest of Polynesia.²⁸¹ At the same time, he recommended, to the Chilean government, ways to introduce private property as way to make the island more productive.²⁸² Pedro Toro left clear confirmation that “Private and permanent ownership did not really exist in the countryside. Each individual cultivates and sows a plot of land, which he abandons after the harvest to take another one later on”²⁸³ The oral account of the ceremony of annexation of Rapanui in 1888 tells that the king *Atamu Tekena*, while keeping for himself a piece of ground, gives to Policarpo Toro (the Chilean official and Pedro’s brother) a fistful of grass which meant that even though sovereignty was given away, the inalienable and ancestral right to land was kept.²⁸⁴

‘Según la tradición oral el entonces ariki Atamu Tekena como gesto simbólico y para reafirmar el acuerdo entre las partes, cogió un trozo de pasto con tierra entregándole el pasto a los comisarios, quedándose ellos con la tierra, queriendo decir con esto que otorgan la soberanía al gobierno chileno, pero se reservan el derecho inalienable y ancestral de su tierra.’²⁸⁵

²⁷⁹ Ibid.

²⁸⁰ Delsing, n. 45, 5.

²⁸¹ Ibid.

²⁸² Delsing, n. 45, 6. Delsing’s translation of Pedro Toro’s words: ‘The creation of private property would stimulate work, production and exchange. It would create healthy competition, since each indigena [...] would see himself as exclusive owner of his property...’

²⁸³ Delsing, n. 45, 5 translating Pedro P. Toro’s words (1893, 205).

²⁸⁴ N. 6, II, 62; also n. 10, 87.

²⁸⁵ According to the CVHyNT, the account is based on Bienvenido Estella (1920) and Paloma Hucke (1995).

In my opinion the classical depiction of describing this claim as “common ownership” is erroneous. The fact that the agent of colonisation realized that individual ownership did not exist, does not mean that common ownership is an alternative to describe the legal meaning of this form of land administration. There is not enough evidence to conclude that individuals “shared fractional interests” of the island territory. Shares which supposedly one may dispose of (alienate) at will, or with the consent of the rest of the associates, through partition. The abstraction which represents the fact of imagining “shares”, “quotas” or “percentages” in the land was unknown to Polynesians. The land was not an object of abstract division but only object of physical division through boundaries. The borders which existed between tribes, namely *mata*, in Rapa Nui or *hapu* to Maori, belonged to the ‘political dimension’²⁸⁶ of the land tenure system.

This view is not new. Adrian Tanner argues continuous misrepresentations of colonial and postcolonial officials which do not address the, still existing, complex system of indigenous Fijian land tenure. This system comes from pre-colonial times. The Fijian tenure system,

‘... is not based on simple collective (or communal) principles, but on a complex balance of individual rights and forms of sharing, embedded in the system of subsistence production, involving land, labour, and the redistribution of production. Here the term “collective” applies to situations where several individuals have equal rights and/or obligations, while “communal” is for more general collective arrangements based in social institutions that deal with a wide range of cooperative relations. Colonial authorities formalized their communal mischaracterization of land tenure...’²⁸⁷

‘When British colonial officials decided to recognize, protect, and register native Fijian land, they needed to formalize its principles. They did so by declaring this land to be collectively held, the property of a particular patrilineal lineage group, known as *mataqali* [...] Given this formal arrangement, native land appears to qualify as common-pool resources from the perspective of modern common property theory [...] Yet [...] the formal land-owning lineages do not actually exercise exclusive rights in common, there being a more complex system of rights. While some parts of a lineage’s lands are indeed held and used in common, in other areas, particularly the all-important garden land, exclusive rights are held by adult individuals, as are rights to other land-based resources, including the right to harvest some particular forms of natural vegetation...’²⁸⁸

²⁸⁶ N. 33, 64.

²⁸⁷ “On Understanding Too Quickly: Colonial and Postcolonial Misrepresentation of Fijian Land Tenure” by Adrian Tanner, *Human organization*, Vol. 66, No. 1, spring 2007, pp. 69-77. The Society for Applied Anthropology, 2007, 69.

²⁸⁸ N. 287, 70.

Tanner's incisive account does not try (because it was not his aim) to analyze the legal nature of this particular understanding which seems to be eclectic and variable. Rather, he stresses the anthropological features attached to it while implicitly recognising the continuous mistake of depicting the land tenure system as "common" or "collective" ownership.

Reframing classical depictions of Polynesia land tenure system, and the legal nature of the Polynesian "land governance"

According to Metraux, in ancient Rapanui, the ground belonging to a lineage was called '*henua poreko ranga* (the land where the ancestors were born).'

²⁸⁹

'All the people were supposed to have about the same amount of land to cultivate. Each estate was probably a straight strip of land (*kainga*) which stretched away from the shore toward the interior of the land. Shares owned by the different families were subject to changes from one generation to the next, depending upon the deaths and resultants inheritance ²⁹⁰[...] Every family owned the land either hereditary, compulsory, or voluntary occupation put into its hands, and if you [European] intended to buy land, you had to buy the land s from all the individuals on the place in order not to cheat somebody.'

²⁹¹

According to Sir Kawharu the only primary foundation of the individual right of Maori people to landed property was, as in Rapanui, "occupancy", or appropriation by labour, which was deduced from the phrase "*I ka tonu taku abi, I runga I toku whenua.*"²⁹² This means that "my [*a* possessive] fire has always been kept alight upon my [*o* possessive] land"²⁹³. This is consistent with the Marquesan, Rapanui and Hawaiian possessives analysed above.

The Maori *kainga* was not only valuable because it was "appropriated by labour" a 'field of operations' where 'one concentrated on cultivation', but also 'for dignity and rank that was attached to its ownership.'²⁹⁴ The land rights, according to Kawharu, 'were administered by family heads at the sub-tribal level and by representative sub-tribal elders at the tribal

²⁸⁹ N. 236, 142.

²⁹⁰ N. 236, 143.

²⁹¹ N. 236, 142 quoting Roussel.

²⁹² N. 50, 41 quoting Smith (1942: 54)

²⁹³ Ibid.

²⁹⁴ N. 50, 45.

level.²⁹⁵ Kawharu describes this as a sort of “right of usufruct” which in my view is erroneous since it is done again through the *prism* of Roman law of property.

Sir Edward Taihakurei Durie instead refused to depict this use of land as a “right of usufruct” because ‘customary land interests transcended “western ownership” having both proprietary and political dimensions. Land rights and rights of political autonomy and control were both fused and severable.’²⁹⁶

‘The individual use of land may not be characterized as a usufruct or something less than “ownership”. The group right however involved more than ownership and was akin to sovereignty. There was a principle of “territorial control” as distinct from land use entitlements’²⁹⁷ [...] ‘The term “ownership” is inappropriate in Maori customary, western “ownership” vesting the several rights of use, benefit, control, transfer, reversion and identification in a single proprietor divorced from community relationships’²⁹⁸[...] The Western-Maori distinction would not appear to be between “individual tenure” and “communal tenure”. In varying degrees, western and Maori societies had elements of both. Maori use rights were vested in individuals. The distinctive feature of Maori tenure was that individual tenure was conditioned by community responsibilities’²⁹⁹ [...] ‘Proprietary interests thus pertained to resources not land blocks and individuals owned usufructs, not territory. The right was to use a particular resource for a settled purpose intermittently or at an agreed time or season or to cultivate or fish at same spot. Consequently many persons and groups had different and overlapping interests in any discrete area, one to collect berries, another to plant kumara, some to hunt pigeons at certain time and others to build or reside etc. There were also subsidiary use rights to traverse the area or to take water’³⁰⁰.

It can be seen that the overlapping Maori interests related to land do not align with classifications of western property. There is no proper name to describe this but let me call it as “geographical control and care of the land” which could have been exercised by individuals or by groups of individuals. Those in charge, those who “supervised” the *kainga*

²⁹⁵ N. 50, 58. ‘The right of every individual to an equal share of his community’s resources was recognized by giving him rights of occupation or access to those resources. These rights could not be taken away from him by anyone, even a chief, without the sanction of the community authority that assigned them. However, although his title might be inviolable to any other individual, it was at all times subordinate to the general interests of the community and could be revoked on the authority of the elders’.

²⁹⁶ N. 33, 64.

²⁹⁷ N. 33, 64.

²⁹⁸ N. 33, 67.

²⁹⁹ N. 33, 67.

³⁰⁰ N. 33, 68.

or the fields of operations had, also, the “stewardship” to derive benefit from the *whenua*, the integrated habitat.

In the Marquesas, according to Thomas,

‘Some European observers of Marquesas society, who perhaps knew something of the other Pacific chiefdoms, assumed that in some sense chiefs owned all the land [but] in the Marquesas, parcels of land were individually held and [...] there was no privileged chiefly ownership’³⁰¹.

‘It appears that this land was either inherited or seized, and that use rights might be allocated on various terms, but there is no suggestion that any larger system existed, or any kind of more general or regal ownership on the part of a chief...’³⁰² [...] ‘Independently of the king, who is hereditary, and the village chiefs, who are also, [...] property is recognized and respected on this island...’³⁰³

In Samoa, a similar situation was observed; property was vested in the family, not in the individual.³⁰⁴ ‘The personal rights of some individuals to certain sites (in the villages) and lands were recognised, but as a general rule the lands belonged to the family as a whole...’³⁰⁵ According to Williamson ‘there was not, and could not be, any real title to land; the title was by occupation, and those who had once occupied had a right to a share, but no more than a share, of what was going. Any member of a tribe that owned land could come and take his portion, but his right was only that of occupation.’³⁰⁶ Williamson wondered whether ‘a group of owners, or an individual owner, [could] alienate their or his land’³⁰⁷? ‘The selling of the land to a white man ‘in the sense of parting for ever with the ownership of it, for a consideration paid down or otherwise received, does not appear to have been an indigenous practice in Samoa.’³⁰⁸ ‘Samoans did not know the custom of selling land.’³⁰⁹ This description may represent the political dimension of customary land interests, described by Durie in relation to New Zealand Maori people.

³⁰¹ N. 222, 48.

³⁰² N. 222, 49 and 51.

³⁰³ N. 222, 49 quoting Roberts.

³⁰⁴ N. 227, 236 quoting Stevenson.

³⁰⁵ N. 227, 239 quoting Brown.

³⁰⁶ N. 227, 237 quoting Goodenough.

³⁰⁷ N. 227, 235.

³⁰⁸ N. 227, 241.

³⁰⁹ N. 227, 241 quoting Stuebel.

Williamson stated that “selling” ‘had been done under white men’s persuasion and temptation, though it was contrary to Samoan customs.’³¹⁰ In the past, he argued ‘ownership had simply been a right of permission to occupy’ and also that there were no methods of alienation.³¹¹ “There appears to have been a system analogous to what we call “letting” of land –that is, allowing someone else to have use of it’³¹².

Goodenough tells the story of a white man ‘who apparently thought he was buying the land, was only acquiring the authority to come and cultivate.’³¹³ Nevertheless, according to Ella, ‘the land was held, not only by tenure of inheritance, but also by gift or purchase’ yet ‘it seems more probable that what was given was merely the permission to occupy.’³¹⁴

In Tonga,

‘the idea of an out and out sale of land seems to have been unknown to the native mind prior to contact with white men. The missionaries say the land was not sold, the natives having no knowledge of anything similar to real estate (*immeubles*); but the chiefs, who sympathized with them, would willingly cede the necessary land, and although the soil would still be regarded as the chiefs’ property, the missionaries would be able to erect their own constructions...’³¹⁵

Even though the customs present variations, one can find fundamental differences by contrasting those legal worldviews with the concepts of ownership and sovereignty and the notions behind them. The very old ethnographies quoted by Williamson unconsciously depicted, wrongly, those customs through the “lens of ownership” as they describe the Durie’s ‘political dimension’ of the use, control and transference of land in ancient Polynesian societies, by resembling these customs as forms of property.

Unlike the univocal western strong-possessive, Polynesian linguistics classified, either strongly or loosely, their owned-possessions. Then, even though they did not classify between *moveable* and *immoveable* things, they actually were able to differentiate the land from

³¹⁰ N. 227, 243.

³¹¹ N. 227, 255.

³¹² N. 227, 263.

³¹³ N. 227, 263 quoting Goodenough.

³¹⁴ N. 227, 263 quoting Ella.

³¹⁵ N. 227, 267.

the rest of things. But, they did that, solely, to define the political consequence of the adoption of certain and distinctive philosophies to control the land and its resources. In fact, they did not classify as a means to exercise ownership, namely individual or common, but only in regards to the government of the territorial space. They distinguished land from the rest of the things but only in order to determine the governance of it by the collective corpus.

By way of conclusion of chapter two

It is very likely impossible that I de-contextualise myself from the framework given by my western culture. Nevertheless, it is reasonable to hope, through the deconstructive method, to keep the analysis neutral. Perhaps, it is an impossible dream to think, reason, and conclude from the personal circumstances of my legal training and even more some spurious outcomes may result from the theoretical exercise. But, regardless of that fact I still believe that a re-contextualisation of western land approach is needed if there truly is a wish to respect the rights of the indigenous populations in present times.

As land was *extra-commercium* it should not have been depicted from the perspective of the law-of-property but from the standpoint of political-science theory. Rome, through its law, has been probably one of the most successful cultural paradigms in human history, but despite that there is a necessity, from my perspective, to reject any theoretical terms of reference which may be limited by alien logic: the western law-of-property paradigm. Rather, we should propose alternatives within the international political order to make the space for novel indigenous polities. Land repossession must be understood in those terms.

Are supreme notions capable of protecting societies from the imminence of human necessity or the proximity of social uprising? Will the *imperium* of force stop, permanently, the endless call for respect and recognition? It is through economic cooperation and the coherence of proper (not apparent) liberal principles that Rapanui will be able to organise effectively to cover their needs and to live better lives. Within the boundaries of Oceania the Rapanui will recover their being.

Chapter three: Redefining the legal status of RapaNui under international law

Preface

Chapter three argues through international law theory and practice. Here it is contended that the state of Chile has been breaching, systematically, voluntarily or involuntarily, several norms of international law regarding the right of political self-determination of peoples. The case does not focus attention on the facts of colonialism, which is a common strategy, but rather it focuses on the question of identifying the time when those facts were committed, that is, whether it was within or outside of the formal colonial era. It is said that Rapanui was a ‘Colony of Chile’ in the period 1888-1966³¹⁶ but to date the situation of political subjugation of the locals to foreign powers has not changed. Executive, legislative and judicial competences are fully exercised by Chilean state organs and functionaries.

The legal importance of this reasoning is the matter of “intertemporal law”³¹⁷: What are the particular international law principles applicable at the time in question? In international law temporality is essential to determine the rule applicable to the case. The case depends not solely on the evidences of colonialism: not just evaluating “what” colonialism happened but also “when” it happened, thus it depends also on demonstrating its contemporaneity. In respect to the “what”, all the Rapanui scholars agree, yet in respect to the “when” there is no legal certainty. The thesis aims to shift almost entirely the legal standpoint of analysis in regards to the sovereign legitimacy of Chile on Easter Island. It does this in two different but linked ways: By *re-periodisation* of the common understanding which basically demarcates Chilean colonialism from the year 1888 to 1966. By *re-definition* of Rapanui international legal status, the period between 1888 and 1966 is, for the thesis, simply the preparation for the massive intervention which came after. In 1966 the *Ley Pascua* or Easter Island Act was enacted and published by Chile. By this Act, ‘after 78 years of virtual slavery’ islanders officially became citizens³¹⁸ of the Republic. From 1966 the Chilean bureaucracy has been

³¹⁶ *The South Pacific* by Ron Crocombe, Institute of Pacific Studies, University of South Pacific, Suva, Fiji, 2001, 689. ‘1965 unsuccessful revolt in favour of independence led to full civil government.’

³¹⁷ *International Law* by Malcolm N. Shaw, fifth edition, Cambridge University Press, United Kingdom, 2003, 429.

³¹⁸ “Chile’s bitter Pacific legacy” by Grant McCall, *Pacific Islands Monthly*: PIM journal article; v.59 No 11, 1988, 44. ‘Rapanui became a full part of Chile in 1966, with islanders becoming full citizens after 78 years of virtual slavery.’

brought to the island progressively, or *in crescendo*, until our days. Regardless of the positive advance that citizenship was, the thesis that the 1966 milestone to mark the finalisation of a *sui generis* proto-colonial³¹⁹ period. Hence it was only after 1966 that the island was effectively colonised or that the process of colonialism truly started from a legal perspective. The striking coincidence is that this happened when most of the colonised world, including Oceania, was in the midst of political decolonisation.

The thesis casts into high relief this paradoxical fact. On the one hand, while the world, and Chile included, was signing the main UN treaty concerning political self-determination, the ICCPR³²⁰, Chile was beginning its own process of political colonisation in Rapanui. The commonplace belief (held by both Rapanui and Chilean politicians) identifies 1888 as the critical date of sovereignty's cession to Chile. This would happen when the Rapanui chiefs of the time voluntarily agreed in handing over the control of the island to the Chilean representative through the so-called "Agreements of Wills" or, the Deed of Cession and Proclamation of 1888 [Deed 1888].³²¹ What this thesis argues, according to the international law of the time, is that the island's sovereignty was not ceded in this manner but rather that the island's sovereignty has been lost by Prescription: a mode of acquisition of territory also named effective occupation. Instead of cession of sovereignty, the mode by which Chile acquired (or is acquiring) Rapanui was the presumption of the right of Chile above the right of the natives. This assertion over the Oceanian territory has been based on a long-term exercise of power by Chile and its institutions on the island. In other words, the way by which Easter Island became (or is becoming) Chilean is by virtue of international toleration of consolidation of Chilean institutions over time. Hence, without foreign power opposition the only way to avoid final consolidation is insider opposition, which is what has been happening since, at least, the early 1980s. The divergent point of view here presented, when assumed, weakens Chile's assertion of sovereignty because the animus of lord and owner needed to acquire territory by *Prescription* must be followed by the effective occupation of the territory. From a legal point of view, acts of efficient colonisation have, it is argued, been

³¹⁹ The *proto-colonial* concept thanks to Francisco Torres H., Francisco Torres, personal communications, August 2009.

³²⁰ UNGA resolution 2200 (XXI) of 16 December 1966, "International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights" adopted by the 1496th plenary meeting, United Nations, URL: www.un.org/documents/resga.htm.

³²¹ Refer to Dr. Grant McCall who claims to archive one of the original duplicates of the Deed. Anthropology & Pacific Island Studies, Social Sciences & International Studies, Faculty of Arts & Social Sciences, University of New South Wales, Sydney NSW 2052, Australia.

occurring only since 1966 when Chile realised (consciously or not) that it possessed a distant territory still awaiting domination.

The aim of this reasoning targets the so called “critical date” that is to establish criteria to situate the effective occupation of the territory by Chile. Colonialism was once a licit way to acquire territory but today it is not. If chapter three proves the Chilean colonialism’s contemporaneity, the theme should be re-evaluated in terms of international lawfulness. If chapter four builds a theoretically competent judicial scenario, the theme, in Chile, should be re-evaluated as a “matter of state” because it points to the unconstitutionality of the current official stance. Moreover, if the project is capable of displacing a very politicised issue from the arena of politics, activism vis-à-vis establishment, to judicial terrain, then, it will be not a question of mere political willingness but of law. The thesis’ goal is hence to appropriate an issue from one realm to another to then give it back: to transfer it from politics to law and from politicians to lawyers to then go back from law and lawyers to politics and politicians.

The legal *re-periodisation* of the Chilean colonisation and *re-formulation* of the legal status of Rapanui is also made by contrasting *nationality* and *ethnicity* as modern conceptualisations of peoples which, in the end, have influence on the international legal status of first-peoples cultures. From a legal perspective both concepts are important in terms of determining who are entitled to the “political” right of self-determination or, on the contrary, who are just entitled to the “cultural” right of self-determination. This distinction is determinant as far as law of decolonisation is concerned. Nations are independent entities considered as such thanks to geographical, racial and linguistic considerations, whereas ethnicities are solely worthy of cultural respect since they are seen not as independent entities but “integrated” into or assimilated in and by the nation-state order, under which they struggle to survive. For the first group of *nationalities*, the law of decolonisation applies, eg. ICCPR, for the second group of *ethnicities*, the C-169³²² and the GA Res 61/295³²³ apply. Hence, depending on a simple legal distinction the culturally same *nation-ethnicity* may be depicted as “nationality” or “ethnicity”, which may look odious from the perspective of fairness and justice, though for the case of Rapanui might be beneficial in legal terms because it carries an

³²² Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention 169 [C-169], International Labour Organization, adopted on June 27th 1989 Geneva, in Session 76th of the General Conference. URL: <http://www.ilo.org/ilolex/english/convdisp1.htm> .

³²³ UNGA Resolution A/61/295 of 13 September 2007, “United Nations Declaration on the Rights of Indigenous Peoples” [UNDRIP], adopted in sixty-first session, agenda item 68, 107th plenary meeting, United Nations, URL: www.un.org/documents/resga.htm .

important consequence from the perspective of international law. Chilean law since 1993 has depicted the people of Rapanui as an ethnicity and therefore applies on them the law of ethnicities above mentioned. But, it is argued that this novel 1993-depiction displaced the former depiction which is thought was more proper. Until 1993, at least two Acts (1966 and 1979) referred to them as *naturales* or *originales* which are interpretable as belonging to the first category of *nationality*.

This chapter will not be different from the last in the sense of proposing alternative approaches concerning indigenous peoples, particularly the people of RapaNui. It nevertheless, delves, into more concrete legal matters related to determining the international legal status of the people and territory of Rapanui. To legally analyse the issue keeping in mind the difference between “public” and “private” spheres of action, according to the Chilean legal order, because that determines the law applicable.³²⁴ It is also necessary to recall the theme of sovereignty and land ownership as a unified concept when translated into Rapanui terms of reference.

I will situate the government’s relevant colonial intervention on the island as being from 1 March 1966.³²⁵ I will propose a new legal timing of the colonial period of the island. I argue that a legal redefinition of the status of the people of Rapanui is needed on the basis of the international law applicable to the case: a redefinition of the mode of acquisition of territory whereby Chile acquired Rapanui according to public international law. Therefore, the island was not acquired in 1888 by *cession* as commonly thought but rather it has been acquired since 1966 by *prescription*.³²⁶ The mode of acquisitive prescription as ‘the legitimization of a fact’³²⁷ is the mode applicable to this hidden (conscious, unconscious or subconscious³²⁸)

³²⁴ Which is basically based on European- continental law mostly Spanish and French law.

³²⁵ There are other disciplinary points of departure to situate the era of Chilean colonialism in the island. For instance, according to Douglas Porteous ‘[...] in the context of an analysis of centre-periphery relations, the island’s development could well be divided into: (i) a colonial period, up to 1888; (ii) a neocolonial period, 1888-1952; and (iii) a period of internal colonialism, which began in 1952 and has yet to terminate.’ See *The Modernization of Easter Island* by Douglas Porteous, Western Geographical Series: Volume 19, University of Victoria, British Columbia, Canada, 1981, vi.

³²⁶ Riet Delsing raised the question for the very first time. She argues, correctly, that ‘the only way for Chile to claim sovereignty today is through prescription’ (N. 10, 93). The legal reformulation I am presenting here is not the first attempt in developing the matter, yet from a legal perspective it is. I hope that this perspective may alter the course of the current politics of the island and the stance of Chile before international forums because it follows a reasonable line of thought.

³²⁷ N. 317, 426.

³²⁸ ...deliberate, involuntary or simply determined by historical circumstances... improvised governmental attitude? What shaped the Chilean official culture towards Rapanui? Who knows...

process of colonialism which legally came to concretise the whole process of proto-colonialism initiated long before. Only, since 1966, has the island been acquired by Chile through acts of effective jurisdiction.

The legal redefinition will be based too on a sort of Rapanui people's legal reframing of its culture. As Gonschor, similarly argues, instead of framing them as Chilean ethnicity as a recent statute did, the thesis proposes to see them as a nation with full rights of statehood, in the traditional sense of the word.³²⁹ Since 1993 the Rapanui have been depicted as ethnic Chileans. On the contrary, I argue that they should be seen as a large aggregate of people united by common descent, history, culture, or language, inhabiting the territory of *Te Pito O Te Henua*, that is, as a nation-people in the original sense of word.

The modes of acquisition

What is the legal tie between the Republic of Chile and Easter Island? Or, in other words, what is the legal nature of the political relationship between the Republic of Chile and Rapanui (people and territory) when the available historical evidences are interpreted according to law? In order to decipher what "mode of acquisition of territory" applies to the Chilean assertion of sovereignty on the island, I will basically follow Malcolm Shaw³³⁰ teachings in international law to argue that Easter Island has been becoming Chilean since 1966 by prescription. The mode of acquisition of territory by *acquisitive prescription* lays the foundations for a case of political decolonisation before the OAS judiciary, as chapter four will show. Basically, international treaties concerning the collective self-determination of peoples are contemporaneous with this prescription and therefore arguable before courts, according to intertemporal law.

This is a controversial view when compared with the argumentation of three Chilean scholars who have backed the Chilean assertion of sovereignty on the island and its legality. Having in mind the cause of Rapanui self-determination, I argue against the assimilationist standpoints of Vergara³³¹ Lopez³³² and Cousiño³³³ which uphold, on the contrary, the

³²⁹ N. 1, 230.

³³⁰ N. 317.

³³¹ *Isla de Pascua, Dominación y Dominio* by Víctor M. Vergara, Publicaciones de la Academia Chilena de la Historia, Universidad de Chile, Chile, 1939.

position of the state of Chile. On the other side, the majority of scholars from historical and anthropological backgrounds broadly agree in depicting the nature of the Chilean occupation of Rapanui as colonial.³³⁴ My proposition however states that what converted this colonialism into an unlawful matter is the application of the intertemporal law because it occurred in the era of the nation's political decolonisation. The era comprehended between 1888 and 1966 which to me is the proto-colonial stage of the Chilean presence on the island is actually colonial but, from anthropological, historical and private-law point of view. In contrast, from an international public law point of view, the Chilean colonialism starts in 1966 and not in 1888.

It is said that on 9 September 1888 Chile took possession of the island through the Deed 1888, whilst I say that from the perspective of international public law, it did not. On the one hand, I argue that the Deed 1888 constitutes only an antecedent which marks the beginnings of the proto-colonial legal period. On the other hand, I argue that the Deed 1888 marks the beginning of a private law type colonialism which is usually confused with the legal basis whereby Chile asserts sovereignty over the island. In fact, in 1888 Chile did not take possession. Through the Deed and under Chile's sponsorship, a series of private law transactions did follow smoothly, all involving the use of the land of the island. In none of those transactions were the Rapanui people consulted. In the end, the private commercial operations were used in favour of government's increasing of patrimony: the whole island's ownership was inscribed in 1933 by alleging it was *terra nullius* and consequently state-owned. According to international public law, acquisitive prescription is the mode of acquisition applicable. It is as a sort of default mode which operates when other modes are not clear or sufficient to argue the validity of the acquisition of territory, as is the case of Rapanui.

³³² "How Did Chile acquire Easter Island?" by Carlos Lopez, Menlo College, Consular Agent for Chile, San Francisco, California, *Rapa Nui Journal*, Vol. 12 (4) December 1998, pp. 118-122.

³³³ "Estatutos de Relacion entre Isla de Pascua y el Continente" by Jose Antonio Cousiño C., Instituto de Estudios Internacionales Universidad de Chile in *Informe de Avance Proyecto 899/92 FONDECYT; Proposiciones para una Política Exterior de Chile en el Pacífico. Repercusiones para el Territorio Insular Isla de Pascua*, unpublished paper available in Biblioteca W. Mulloy, Museo Antropológico de Isla de Pascua, MAPSE, Easter Island, pp. 1-12, n.d.

³³⁴ As mode of example, see "Riro, Rapu and Rapanui. Refoundations in Easter Island Colonial History" by Grant McCall, *Rapa Nui Journal*, September, Vol. 2 (3) pp. 112-122, 1997; or "Colonialism and Rapanui Identity" by Alejandra Grifferos, *Easter Island In Pacific Context South Seas Symposium*, Proceedings on the Fourth International Conference on Easter Island and East Polynesia, University of New Mexico, Albuquerque, August 5-10, 1997, Easter Island Foundation, Los Osos, CA, USA, edited by Christopher M. Stevenson, Georgia Lee, F. J. Morin, pp. 365-367, 1997.

The Deed of 1888³³⁵ and the *cession* of sovereignty

It is held by officials and local leaders that the Deed 1888 is “the” legal and political source by which the island became Chilean.³³⁶ At first sight this is true. According to intertemporal law, by 1888, international law accepted the mode *cession* of sovereignty, as mode of acquisition of territory, when local chiefs signed the cession. Treaties of cession, in colonial times, were an accepted way by which European powers, or in the case of Rapanui, novel republics of western background like Chile, annexed territories. Cession,

‘involves the peaceful transfer of territory from one sovereign to another (with the intention that sovereignty should pass)...’³³⁷ ‘The basis of cession lies in the intention of the relevant parties to transfer sovereignty over the territory in question.’³³⁸

In the post-1966 era, the islander’s plea for political autonomy has been based mainly on the *Deed 1888* popularly known as the *Acuerdo de Voluntades* or Agreement of Wills.³³⁹ The plea found further support after the official publication of the report of the Commission of Historical Truth and New Deal between the State of Chile and the Indigenous Peoples.³⁴⁰ The CVHyNT report expressly recommended, to the State of Chile, that it confer autonomy on the Rapanui people: ‘To grant an autonomy statute for Easter Island according to the normative basis established by the “Agreement of Wills”’.³⁴¹

³³⁵ See Appendix No 1. The CVHyNT worked based on one of the duplicates of the Deed. The remaining one was provided by the anthropologist Dr. Grant McCall who participated in the CVHyNT workshops. He gave a scanned copy of the duplicate which according to him is the Rapanui duplicate. There is no official record of the Chile government’s duplicate (the one upon which scholars such as Vergara based their conclusions and studies).

³³⁶ Eg. “Project of Constitutional Organic Law Special Statute of Administration of Easter Island” (2005) in the Home Office Ministry’s official documentation, in URL: http://www.subdere.gov.cl/1510/articles-67988_recurso_2.pdf.

³³⁷ N. 317, 420.

³³⁸ N. 317, 421.

³³⁹ *Te Mau Hatu ‘O Rapa Nui. Los Soberanos de Rapa Nui. Pasado Presente y Futuro de Rapa Nui* by Alberto Hotus et al., Editorial Emision, Centro Latino americano Simon Bolivar, Chile, 1988, 301, 348 and 351. According to McCall, Alberto Hotus, a prominent Rapa Nui leader, coined the term *Acuerdo de Voluntades* to refer to the *Deed 1888*. Grant McCall, personal communications, April, 2009.

³⁴⁰ N. 6. The CVHyNT was aimed to build a new relationship between the state of Chile and its indigenous populations, of American origins and Rapanui. In order to begin this “new deal”, many political actors were called to participate in it to generate a sort of consensus in historical debates related to the conflicting past relationship. Ultimately, the aim was to delineate the State’s parameters for future policies towards indigenous communities who were seen and recognised an integral part of the Chilean identity.

³⁴¹ N. 6, III, 136. *Otorgar un estatuto de autonomia para Isla de Pascua, de conformidad a los presupuestos normativos del “Acuerdo de Voluntades”*.

According to the CVHyNT report³⁴², the Spanish version of the bilingual Deed 1888 established that the island’s chiefs and the Capitan of the Navy Policarpo Toro “representing”³⁴³ Chilean government interests concurred in the following agreement:³⁴⁴ On the one side, by *Cesión*,

‘Los abajo firmantes jefes de la Isla de Pascua, declaramos ceder para siempre y sin reserva al Gobierno de la República de Chile la soberanía plena y entera de la citada isla, reservándonos al mismo tiempo nuestros títulos de jefes de que estamos investidos y que usamos actualmente.’

‘We, the undersigned chiefs of Easter Island declare that we cede for ever and without reservation to the government of the Republic of Chile the full and entire sovereignty of the island reserving at the same time our titles of chiefs which we are using today.’

Or as Lopez says, ‘[t]hey ceded the rights to the island to the government of Chile, forever and without reservation, but reserving their rights and privileges as chiefs.’³⁴⁵

On the other side, by *Proclamación*, Capitan Policarpo Toro “officially in the island”³⁴⁶ declared acceptance of the cession of sovereignty ‘subject to Chilean government ratification’³⁴⁷.

Policarpo Toro H. Capitán de Corbeta de la Marina de Chile i comandante del Crucero Angamos oficialmente en esta declaramos aceptar salvo ratificación de nuestro Gobierno la cesión plena, entera i sin reserba [sic] de la soberania [sic] de la Isla de Pascua, cesión que nos ha sido hecha por los jefes de esta Isla para el Gobierno de la Republica de Chile.

Thanks to the phrase *salvo ratificación* it has been understood since then that the Deed 1888 established that Capitan Toro as Chilean representative acted subject ot ratification of the treaty, which until today has not happened.³⁴⁸ According to the CVHyNT report in the Rapa Nui version of the bilingual deed by *Vaai Hanga Kainga* the Rapa Nui chiefs rather than

³⁴² N. 6, II, 69.

³⁴³ I am arguing this very point.

³⁴⁴ See also N. 331, 112 – 113 (anexos XII and XIII); N. 6, II, 69; N. 10, 86-87; N. 332, 120.

³⁴⁵ N. 332, 120.

³⁴⁶ I am going to argue this point.

³⁴⁷ N. 318, 43.

³⁴⁸ N. 6, III, 136.

ceding sovereignty declared their will to give the territory of Te Pito O Te Henua into the hands of Chile as *boa*. ‘[...] Chile would act as protector and “friend of the place”’.³⁴⁹

Juntos el Consejo de Jefes de nuestro territorio de te Pito o te Henua, hemos acordado escribir lo superficial. Lo de abajo el territorio no se escribe aquí. Ellos informaron en conversación con nosotros que nuestro territorio Te Pito o te Henua estará en la mano de la nación chilena como amigo del lugar. Escrito está en la mano del Consejo del territorio, el bienestar y desarrollo según nuestras investiduras impuestas por mandato Rapa Nui.’

As McCall suggests (and Lopez acknowledges) the chiefs were ‘insisting that they had sold nothing and that the land was to be under the protectorate of Chile’.³⁵⁰ In effect, the will of the Rapanui chiefs was not exactly to cede sovereignty but expecting protectorate from Chile. On five, or at least three, times they had asked, through the catholic missionaries, protectorate status from France.³⁵¹ Protectorates was the common way to influence without internal irresponsibility for internal government.³⁵² Then, the idea of chiefs asking for protectorate and not ceding sovereignty is sensible from an insider’s perspective. According to Hito, *Vaai Hanga Kainga* rather than cession means “give care to the motherland”.³⁵³ It is worth recalling here the chapter two discussion on the divergent understandings when sovereignty and land ownership concepts are translated into Rapanui terms of reference. To give care to the motherland might perfectly be rendered into western terms as protectorate.

Despite the interesting issue of the real intention of the chiefs, I am going to explain why I think that current local leaders’ insistence and activism on getting the Deed 1888 ratified by the National Congress, by statutory means, would be fruitless.³⁵⁴ Unless there is a profound change of official attitude the Deed 1888 will stay off the negotiation table. The reality is

³⁴⁹ N. 318, 44.

³⁵⁰ McCall n. 334, 114; also n. 332, 120.

³⁵¹ According to Grant McCall, the Rapanui people requested a Protectorate from France five times between 1868 and 1886, personal communication, 2009. According to Di Castri ‘[a]t least three times, in 1871, 1874 and 1887, France rejected the local request to extend its protectorate to Easter Island.’ See “Tahitian and French Influences in Easter Island, or the Zoopal Mystery Solved Thanks to Grant McCall” by Francesco Di Castri, *Rapa Nui Journal*, Vol. 13 (3) September 1999, 101.

³⁵² Eg. 1887 Tuvalu and Kiribati; 1889 Tokelau; 1881 Tunisia.

³⁵³ N. 53.

³⁵⁴ If ratified in the legislative system of Chile the “treaty” would be incorporated into the Chilean legal order and, ultimately, the political struggle for self-government would be not only consistent with the normative provisions of the Spanish version of the Deed 1888 (as stated by the CVHyNT, n. 6, III, 69) but also supported by internal law.

that during the last decade the policy of the state in these matters is tacitly to remind islanders of the non-binding nature of the document.³⁵⁵

The curiosity of the case though is the fact that official stances contradict themselves. On the one hand, there is the tacit reminder whilst on the other official insistence on regarding the Deed 1888 as foundational for understanding Chile and Rapanui polities. This paradoxical fact makes sense nonetheless of the easy adoption of the novel nomenclature “Agreement of Wills” to refer to the Deed, which until recently had been called simply the *Toma de Posesión*.³⁵⁶ It looks more decorous in international *fora* to speak of “agreement of wills” rather than “1888 taking of possession”. The Chilean government has emphatically rejected considering Rapanui as a colony or a NSGT.

Some comments concerning the official interpretation of the *Deed 1888* which might influence the overall argumentation. I argue two different things regarding the literal transcription done by the CVHyNT of the Spanish text of *Proclamación*.

As we mentioned above, instead of reading that Capitan Toro was “officially in the island”³⁵⁷, the document doubtlessly reads that Capitan Toro was “currently in the island”. Then, I argue that he declared acceptance of the cession of sovereignty subject to Chilean government *ratification*. Maybe, it rather reads that he declared acceptance but subject to Chilean government *rectification*.³⁵⁸ I think that Policarpo declared acceptance of the cession unless rectified, that is subject to rectification. In Spanish as in English the word *salvo* can either mean the conjunction “unless”; the prepositions “saving”, “excepting” or “with the exception of”, and; the adverbial phrase “subject to”. I believe that the facts need to be considered more openly having in mind all the aspects of the annexation. A very careful

³⁵⁵ According to that view it cannot be considered a “treaty” since it has not been ratified in Chile through the constitutional steps ordered by the Constitution in force by that time, the Political Constitution of 1833. See its article 82: *Son atribuciones especiales del Presidente: [...] 19ª Mantener las relaciones políticas con las naciones extranjeras, recibir sus Ministros, admitir sus cónsules, conducir las negociaciones, hacer las estipulaciones preliminares, concluir i firmar todos los tratados de paz, de alianza, de tregua, de neutralidad, de comercio, concordatos i otras convenciones. Los tratados, antes de su ratificación, se presentarán a la aprobación del Congreso. Las discusiones i deliberaciones sobre estos objetos serán secretas, si así lo exige el Presidente de la República*; URL: www.leychile.cl/Navegar/?idNorma=137535&idVersion=1833-05-25&idParte.

³⁵⁶ *Revista de Marina*, Publicación Bimestral de la Armada de Chile, fundada el 1 de Julio de 1885, año CIV, volumen 105, numero 785, Julio-Agosto 1988.

³⁵⁷ N. 346.

³⁵⁸ Curiously, Hotus et al. (N. 339) contradict themselves when in p. 351 say *rectificación* and after in p. 294 say *ratificación*.

examination of the original duplicate would probably solve the mystery, but here I prefer a systematic interpretation of the legal and historical facts rather than simply accepting something which seems internally inconsistent. On the one hand, Vergara's transcription (which is the oldest known) coincides with me in reading "currently" but, on the other, the transcription of Vergara reads *salvo "ratificación"* and not *rectificación*.³⁵⁹

There is no evidence that Capitan Toro was representative of the Chilean government authorised to accept any kind of cession of sovereignty. Policarpo Toro was not entitled to proclaim in the name of and representing Chile.³⁶⁰ Capitan Toro lacked the mandate to accept a cession of sovereignty. He was mandated by a Minister of President Balmaceda (1886-1891) but to buy lands from the natives, Tahitian-Scotch entrepreneurs and the Tahitian Catholic Church. Although the official intention might have been to annex the island by mode of occupation, as official documents published by Vergara shown³⁶¹, historians agreed that this was a personal-familial enterprise rather than a governmental scheme. In fact, all the lands bought (legally or not) by Toro were bought not in the name of Chile but in his own name and responsibility. Furthermore, Toro was never reimbursed by the government³⁶², which supports my argument of these acts were of legal private nature.

If we accept one of the two arguments presented here (literal re-interpretation and Toro's lack of entitlement) it is reasonably arguable that Capitan Toro was aware that he was exceeding his official powers. There is no evidence that Capitan Toro had or displayed any document which authorised him to annex the island on behalf of the president of Chile. To me, it is possible to think that he accepted the cession of sovereignty, under the negative condition of rectification, knowing that he was reaching public dominion competences and above the powers conferred to him.

What may then explain the orders to buy lands but annexation purposes? He probably thought the order to buy lands was sufficient to annex and occupy the island. The question

³⁵⁹ N. 331, 113, anexo XIII.

³⁶⁰ In the case of the Treaty of Waitangi signed between the Maori people of New Zealand/Aotearoa and the British crown, the official representative of the British Queen to accept the cession of sovereignty made by the Maori *rangatiras* was Capitan Hobson. His instructions from Lord Normanby, the Secretary of State for Colonies, were to get "free and intelligent consent" of chiefs and to deal with them "openly". See *An Illustrated History of the Treaty of Waitangi* by Claudia Orange, Bridget Williams Books, New Zealand, 2004, 19.

³⁶¹ N. 10, 79; also N. 331, 109 anexo X; also N. 332, 120.

³⁶² N. 6, II, 63.

is why he persisted in despite the contrary advisory opinion of two Chilean lawyers (as are quoted by Vergara).

In April 1888, five months before the annexation, two government advisors, Hunneus and Renjifo, pointed out alleged that the buying of land was not enough to create valid title under international law. According to them, ‘ostensible occupation’ was also needed to effectively occupy the island.³⁶³ They rightly warned that international law demands ‘effective acts of jurisdiction’ with public authority representatives such as, as they advised, by maintaining the catholic mission on the island (that one which the Tahitian church just had ceded to the state ecclesiastic authorities of Chile).³⁶⁴ Hunneus and Renjifo were right. Article 35 of the General Act of the Congress of Berlin of 1885 established the doctrine of effectiveness which displaced ‘earlier doctrines relating to discovery and symbolic annexation as in themselves sufficient to generate title.’³⁶⁵ For my purposes, this means that even accepting the validity of the Deed 1888 as source of Chilean sovereignty on the island, without effective occupation of the territory, the initial act of occupation became null. According to Shaw, ‘[o]ccupation is a method of acquiring territory which belongs to no one (*terra nullius*)’³⁶⁶; that was not the case of Rapanui.

The ceremony which took place in September 1888 was totally symbolic in character. After the signature of the document of annexation, a frustrated colonisation did follow. Capitan Policarpo Toro left his brother Capitan of the Army Pedro Toro as agent of colonisation. Pedro Toro remained until 1892 when, poor and abandoned, he literally escaped from the island.³⁶⁷ ‘After the departure of the Toro interests no ships stopped at Rapanui for six years.’³⁶⁸ Soon after the annexation of the island and observing the lack of Chilean interest, the Rapanui people, as Pedro Toro in his memoirs acknowledges, recovered their sovereignty and, the internal jurisdiction of the island was retaken by the Rapanui authorities headed by the king *Riro*.³⁶⁹

³⁶³ N. 331, 107 anexo IX “Informe sobre los antecedentes de Pascua” by Jorge Hunneus y Osvaldo Renjifo, Consejo de Defensa Fiscal, Santiago, 14 de Abril de 1888.

³⁶⁴ Ibid.

³⁶⁵ N. 317, 442.

³⁶⁶ N. 317, 424.

³⁶⁷ McCall, n. 334, 115; also n. 325, 48 – 51.

³⁶⁸ N. 318, 44.

³⁶⁹ *Anexo a la memoria del ministerio de culto y colonización, presentada al supremo gobierno en 1892* by Pedro P. Toro, Ministerio de Culto y Colonización, Chile, pp. 187-216, 1892, 205.

‘La autoridad superior, civil i política, reside, como se ha dicho, en un jefe vitalicio o rei que llaman *Kin*, [...]’³⁷⁰

According to Delsing, Vergara maintained that the island was acquired by occupation.³⁷¹ According to Porteous, Vergara ‘expounded the means by which, under international law, a nation might annex non-adjacent territories’.³⁷² I discount this mode in the case of Rapanui not only because, as Delsing argues, contemporary Rapanui would consider it ‘an insult to their forebears’³⁷³ but also because by 1888 the particular international law principles applicable, according to the Advisory Opinion of the International Court of Justice [ICJ] were,

‘...territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through “occupation” of *terra nullius* by original title but through agreements concluded with local rulers.’³⁷⁴

Rapanui Statehood

Now turned to a related question, the matter of statehood. According to the same Advisory Opinion, agreements such as the Deed 1888, ‘whether or not considered as an actual “cession” of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*’.³⁷⁵ The ICJ when deciding the Western Sahara case avoided the discussion of whether or not such agreements could be considered cessions of sovereignty.³⁷⁶ Yet, to cede sovereignty it is necessary to be a state. That is, if Chile says that the Deed 1888 was “cession”, then logically it is recognising the existence of Rapanui statehood by 1888.

³⁷⁰ N. 318, 44, ‘under Riro’s rule the island redeveloped [...]’

³⁷¹ N. 10, 90.

³⁷² N. 325, 34.

³⁷³ N. 10, 91.

³⁷⁴ *Western Sahara*. Advisory Opinion, I.C.J. Reports, P. 12. 16, October, 1975.

³⁷⁵ N. 374, 31.

³⁷⁶ I guess it did so to avoid a debate around the issue of statehood of so-called ‘uncivilised’ tribes.

The creation of statehood depends on recognition.³⁷⁷ There are two theories defining recognition: constitutive and declaratory,

‘the former theory maintains that is only through recognition that a state comes into being under international law, whereas the latter approach maintains that once the factual criteria of statehood have been satisfied, a new state exists as an international person, recognition becoming merely a political and not a legal act in this context.’³⁷⁸

According to 19th century international law, at first sight, there is no Rapanui statehood to consider seriously due to the fact that Rapanui people were “uncivilised” and not recognised as such according to the constitutive theory. Rapanui was not a state, because it was never recognised as such. Yet, according to Crawford’s counterargument, regardless of what theory we choose it is thinkable to consider statehood of Rapanui in 1888. To Crawford, the principle of the intertemporal law,

‘requires [the] transaction completed at a particular time be judged in accordance with the law in force at that time [...] it does not require that one set of doctrinal or ideological justifications be preferred to another where these are not clearly incorporated in the transaction or practice in question. For the reasons given, the ‘European civilization’ test for the status of indigenous peoples was not accepted in international law at any relevant time.’³⁷⁹

What are the four elements of statehood?

Permanent population, defined territory, government and, capacity to enter into relations with other states.³⁸⁰ In the case of Rapanui, three elements are undisputable yet the requirement of “government” might be debatable on the historical evidence available. Nevertheless, the counterargument according to Shaw, is the report of the ICJ in regards to the Western Sahara case which clearly stipulated that by 1885,

‘For a political society to function reasonably effectively it needs some form of government or central control. However, this is not a pre-condition for recognition as an independent country.

³⁷⁷ N. 317, 185.

³⁷⁸ N. 317, 185.

³⁷⁹ *The creation of states in International Law* by James Crawford, Second Edition, Oxford, Clarendon Press; New York: Oxford University Press, 2006, 271.

³⁸⁰ N. 317, 178 quoting the article 1 of the Montevideo Convention on the Rights and Duties of States, 1933.

It should be regarded more as indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs.³⁸¹

Hence, the question of whether Rapanui enjoyed statehood by 1888 is clearer. I argue that they enjoyed statehood following the above reasoning of Crawford and Shaw. Rapanui people actually exercised, paraphrasing Shaw, some sort of coherent political structure. The Rapanui chiefs seemed to have been aware of the political consequences of the agreement albeit only from their own cultural and political terms of reference. Since the bilingual meanings may reach different conclusions and categorisations of the understanding of exercise of power, as shown in chapter two, each party evidently understood different things when signing. The idea of getting foreign friendship (protectorate) seems natural and sensible after the shocking events which preceded the annexation.³⁸² But what does not seem reasonable is that they gave away sovereignty and land ownership.

Moreover, since annexation by occupation of *terra nullius* is inapplicable to the case, when the Chilean government recalls the legal-political effects of the Deed 1888, the same government cannot then obliterate the Rapanui statehood at 1888 by contradicting itself. There is no way of ceding sovereignty without statehood in both parties. The government then could argue that, following the ICJ Advisory Opinion (1975), agreements signed with local chiefs were ways of acquiring sovereignty without having to discuss whether those ‘uncivilised’ tribes could have had statehood. However, as a counterargument, by reasonably accepting the following facts: insiders asking for protectorate to France just before the Deed 1888; Capitan Toro’s lack of official entitlement; the issue of rectification-ratification, and the accepted fact that, after 1888, the colonisation failed noisily and notoriously (without logic of continuity) the initial title (the Deed 1888) lacks legal certainty at the least. And, when a title lacks certainty prescription appears.

Acquisitive Prescription

³⁸¹ N. 317, 180.

³⁸² N. 318, 43. Eg. the Peruvian blackbirding of 1862.

Delsing has argued that ‘contemporary Rapanui can explore the possibility offered by international law’ in terms of prescription³⁸³ as the remaining mode to apply to the case. According to Shaw, prescription is,

‘...a mode of establishing title to territory which is not terra nullius and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated. It is the legitimisation of a doubtful title by the passage of time and the presume acquiescence of the former sovereign...’³⁸⁴

Hence, I cannot but conclude that prescription is the only mode applicable and that it challenges the Rapanui statehood. If the will of the Rapanui people was to provide protection for the motherland: to leave the territory in the hands of Chile as *boa* (friend) of the place that is protectorate in western terminology, the conclusion is that ‘the formal sovereignty remains unaffected and the entity in question retains its status as state.’³⁸⁵ If Rapanui wanted a protectorate, its sovereignty has remained untouched since then. This legal interpretation is reinforced by the facts, continuous struggle for self-determination and land repossession.

The criteria to establish title by prescription are four: possession which ‘must be *a titre de souverain*, peaceful and uninterrupted, public, and endure for a certain length of time.’³⁸⁶

Here I will explain why the only incontestable requisite is publicity and why the other criteria are arguable. The lack of entitlement of Toro to proclaim sovereignty is already evident. His initial possession was not a *titre de souverain* therefore was not an act of state jurisdiction.

[P]rescription requires that the possession forming the basis of the title must be by virtue of the authority of the state, or *a titre de souverain*, and not a manifestation of purely individual effort unrelated to the state’s sovereign claims.³⁸⁷

Besides, even were I to suppose (wrongly) that he was mandated to acquire sovereignty from the natives, which admits of Chilean possession since 1888, since public abandonment of the island followed the failed colonisation by the Toro brothers I could but understand that the

³⁸³ N. 10, 92.

³⁸⁴ N. 317, 426.

³⁸⁵ N. 317, 195.

³⁸⁶ N. 317, 426.

³⁸⁷ N. 317, 427.

animus of lord was interrupted. The only debatable issue is whether to consider the period between 1888 and 1896 as sufficient to anul the initial physical possession.

In September 1895 the government formally leased the island to the businessman Enrique Merlet³⁸⁸ who with his brother Numa (both Chileans of French ancestry) established a private company to farm sheep on the island. They created the *Sociedad Compañía Explotadora de Isla de Pascua* [CEDIP].³⁸⁹

By decree of 15 June 1896 there were two important outcomes, the *Subdelegacion Maritima de Isla de Pascua* was created, and the company's manager was appointed as *Subdelegado*. For me, the 1896 decree might be considered as the first formal legal act of jurisdiction displayed on the island.³⁹⁰ Under this “company-state format”³⁹¹ the so-called CEDIP ruled the island's destinies until 1953³⁹² when the navy took full control and replaced the CEDIP administration. However, Vergara does not consider the 1895 decree as one of the documents serving to support the domination of Chile of *Isla de Pascua*. To him, the Chilean effective annexation was based on the administrative dependency:³⁹³

- a) *Decreto No 444* of 1916 through which Chile tried to annex effectively the island to the administrative and judicial regime by declaring Easter Island *Subdelegacion del Departamento de Valparaiso* and subject of colonisation through the Ministry of Colonisation.³⁹⁴
- b) The *Ley No 3220* of 1917 which declared Easter Island subject to the *Autoridades, Leyes y Reglamentos navales* (authorities, laws and naval decrees).³⁹⁵

³⁸⁸ N. 325, 53.

³⁸⁹ N. 331, 159 anexo XXX.

³⁹⁰ Decreto firmado por Luis Barros Borgoño de 15 de Junio de 1896 “Creación de la Subdelegación Marítima” en *Boletín de leyes y Decretos del Gobierno*, 1896: 416-417 transcriben in *Isla de Pascua. Horizontes sombríos y luminosos* by Jesus Conte Oliveros, Centro de Investigación de la Imagen, Santiago, 1994, 163.

³⁹¹ According to Porteous (N. 325, 45) like other places of Chile in those times Easter Island became a “company state” because it was organised and maintained by aliens and because its capital was in another country. Also it became such due to its remoteness and lack of indigenous enterprise. To him, state companies in general are ‘able to exert social and even political control through its provision of housing, social services, and its monopoly of employment and of transportation to the hearthland [...] The citizens of the company state look to the company rather than [to] their legal government, for the benefits normally supplied by government agencies.’

³⁹² N. 6, II, 63-64.

³⁹³ N. 331, 70.

³⁹⁴ N. 331, 223 anexo LIV.

³⁹⁵ N. 331, 224 anexo LV.

- c) *Decreto No 8582 of 1927* which reaffirmed administrative dependency on the Valparaiso department.³⁹⁶

A propos of the *Ley 3220* of 1917, in theory, since 1917 the Navy took over and submitted the Rapanui to its rules and regulations³⁹⁷ but, as historical sources show, that actually happened only from 1953. In use of the faculties given to the Navy by the *Ley 3220*, the naval authorities enacted norms for living and working standard on the island under the CEDIP administration. Through that *Reglamento Interno de Vida y Trabajo en la Isla*, (ordinary decree No 85 of 1936) living conditions on the island were supposed to improve but the reality is they remained as before, but from then naval authorities were supposedly guarantors of their fulfilment.³⁹⁸

Peaceful possession is to Shaw ‘essential’³⁹⁹. The requisite of peaceful possession,

‘reflects the vital point that prescription rests upon the implied consent of the former sovereign to the new state of affairs. This means that protests by the dispossessed sovereign may completely block any prescriptive claim.’⁴⁰⁰

Peaceful is not exactly the proper word to describe the endless struggle of the people of Rapa Nui for retaking control of their polity.⁴⁰¹ Here is interesting to recall that between 1944 and 1958 eight groups of Rapanui peoples tried or did escape in boats to either reach

³⁹⁶ N. 331, 70.

³⁹⁷ N. 10, 92.

³⁹⁸ N. 331, 225 – 239 anexo LVII. *Reglamento Interno de vida y trabajo en la isla*, *Decreto Ordinario* No 85 de 1936.

³⁹⁹ *Ibid.*

⁴⁰⁰ N. 317, 427.

⁴⁰¹ Several well-documented uprisings have characterised the Rapanui struggle for self-determination. In 1899, *Riro* the last Rapanui king sailed to Chile to complain to the President of Chile against the company performance. See N. 318, 44; In 1914, a second uprising led by the prophetess Angata. See *Rapa Nui. El diablo, Dios, y la profetisa. Evangelización y milenarismo en Rapa Nui 1864-1914* by Nelson Castro F., Rapanui Press, Museum Store, Museo Antropológico Padre Sebastian Englert, Rapanui, Chile, 2006. Also see “Colonialism and Resistance in Rapa Nui” by Riet Delsing, *Rapa Nui Journal*, Vol. 18 (1), pp. 24-30, Easter Island Foundation, Los Osos, CA, USA, 2004, 26; In 1964-65 the revolt led by Alfonso Rapu provoked the enactment of the *ley Pascua*. See “METEI. A Canadian medical expedition to Easter Island, 1964-65” by James A. Boutillier, *Rapa Nui Journal*, Vol. 6, issue 2: 21-23, 26-33 and issue 3: 45-53, Los Osos, California, USA, 1992; Mentionable are as well the public complaints against Chile in the years 1983, 1998, 2001 (see n. 2). Not to mention the uprising of August 2009 when the *Mataveri* airport was seized by the Rapanui people who were protesting against indiscriminate mainland immigration by arguing the seizure’s legality based on their conviction of their legitimate ownership of the land usurped by the state in 1933 and 1966. Nowadays, May 2010, the “radical” *Rapanui Parliament* is raising again the matter of independence from Chile by setting up placards and an improvised campsite in front of the Governor’s office, Viki Haoa and Rinko Tuki, personal communications, May, 2010. See Proem *News from Rapanui, May 2010*.

Tahiti or Chile. Many of them died in the attempt.⁴⁰² To me, there was no peaceful possession since the people trying to escape from the island show the contrary. It shows a “hidden” struggle for self-determination.

Then, the prescription requires a reasonable period (not fixed) of possession, which will depend on the circumstances of the case ‘including the nature of the territory and the absence or presence of any competing claims.’⁴⁰³ I argue for situating the Chilean colonialism and its reasonable period of prescription from 1966 based upon the *Miniquiers and Ecrebos* case of 1953.⁴⁰⁴ In this case, the ICJ based its decision,

‘primarily on relatively recent acts relating to the exercise of jurisdiction and local administration as well as the nature of legislative enactments referable to the territory in question.’⁴⁰⁵

The history of the region in the *Miniquiers and Ecrebos* case dated from 1066, which is analogously applicable to the case of Rapanui and Chile which dates from 1888. The ICJ did not consider the historical antecedents as much as the nature of the legislative enactments along with the effective exercise of jurisdiction over the territory.

Therefore, on the one hand, the 1917 Act supports the official assertion whereas, on the other, the local administration was still weak from the perspective of state actions (rather than company actions). The state yet implicitly approved the CEDIP actuations did not exercise effective acts of jurisdiction, because the facts (between the years 1917 and 1953) attempt against the apparent official will of annexing the island.

One fundamental matter for the thesis is to determine the legal nature of the sheep company’s rule and its manager’s powers. At first sight it is clear that the manager represented the state of Chile. Chile therefore, one may say, has possessed the island through the “state-company”.⁴⁰⁶ In my opinion, the first traceable legal public instrument regarding

⁴⁰² “Aventuras marinas de Nativos de Rapa-Nui” by Sebastian Englert, in *Revista de Marina*, n.d: 465-475. Photocopy facilitated by Francisco “tio pancho” Haoa Pakomio.

⁴⁰³ N. 317, 428.

⁴⁰⁴ N. 317, 428 citing the ICJ Reports (1953, 47).

⁴⁰⁵ N. 317, 428.

⁴⁰⁶ N. 325, 45.

Chile's assertion of sovereignty on Easter Island dates either from 1896⁴⁰⁷ or as for Vergara from 1916 or 1917 when the subdelegation of Easter Island was created, left under the jurisdiction of the Ministry of Colonisation and dependant on Navy regulations. Regardless of those regulations and enactments, and according to Shaw, the exercise of sovereignty must be exercised by the state or,

'by individuals whose actions are subsequently ratified by the state or by corporations or companies permitted by the state in such operations and thus performed on behalf of the sovereign. Otherwise, any acts undertaken are of no legal consequence.'⁴⁰⁸

In principle, Chile exercised jurisdiction through the private company's manager, nevertheless by ways of counterargument, according to Shaw, the ICJ Report in the *Malaysia/Indonesia* case of 2002 stressed that activities performed by private persons will be seen as *effectivités* only if they took place on the basis of official regulations or under governmental authority.⁴⁰⁹

In the case of Rapanui it is proven that the company and its manager even though formally appointed as representatives of the government were actually *de facto* rulers of the island. They did not respect the minimum requirements that the state of Chile asked from them during most of their administration. Actually Chilean public opinion's awakening and condemnation of the situation of the local people came after knowing of the abuses committed by the company. Another fact is that a naval vessel sailed to the island only once a year and the rest of the year the company exercised total control of island affairs. Another relevant factor to Shaw is that the facts must be 'pursuant to the will of the state to acquire sovereignty.'⁴¹⁰ In regards to this interesting argument let me to develop two different ideas.

On the one hand, when the private company was created as a corporation in 1903⁴¹¹ according to its constitution (*escritura de constitución*), its aim was to acquire ownership of privately owned lands or to take land on lease from the state rather than to administer on

⁴⁰⁷ By Decreto de 15 de Junio de 1896 "Creación de la Subdelegación Marítima" in *Boletín de leyes y Decretos del Gobierno*, 1896, 416-417.

⁴⁰⁸ N. 317, 434.

⁴⁰⁹ N. 317, 434 footnote 135.

⁴¹⁰ N. 317, 435.

⁴¹¹ N. 331, 159 anexo XXX.

behalf of the state of Chile.⁴¹² The company was set up without having in mind the exercise of Chilean sovereignty on the island. In other words, the company should not be considered company-state by reason of its nature, but on the contrary, it should be said that the “state” was the company itself. The state did not set up the company to assert domination but on the contrary, the company was set up by private entrepreneurs and randomly used by the state for its dominant purposes.

On the other hand, and regarding the *animus domini* of the state, according to Shaw the subjective factor requires

‘some connection between the actions undertaken and the assertion of sovereignty [...]’.⁴¹³

If the Chilean state considers, as Vergara argues, that Easter Island belonged administratively to Chile since 1916 or 1917 there is no explanation for the open violation of the constitutional rights of freedom and equality before law of the Rapanui people, according to articles 12 and 10 of the Constitutions of 1833 and 1925 respectively. Despite the regulations the company maintained its abusive administrative system with Chilean acquiescence.

Certainly the subjective possession from Chile did not look so much willing to acquire the island as to dispose of it. Chile tried unsuccessfully more than once to sell the island by auction to Japan, USA and Germany yet from the 1920s up to the 1930s.⁴¹⁴ McCall has coined the term “uncertain sovereignty” to depict the Chilean ambivalent imperialist attitude. According to Fischer,

‘Chile’s move to ‘nationalize’ Easter Island was part of a larger dynamic that was militaristic and nationalistic (no longer mere patriotic). It was designed to integrate the Republic’s hitherto largely ignored and backward peripheries and to extend the centralist hegemony. From 1951 and especially from early 1952, an active campaign was underway to convince all Chileans that the Rapanui were also fully fledged *chilenos*.’⁴¹⁵

⁴¹² N. 331, 159 anexo XXX.

⁴¹³ Ibid.

⁴¹⁴ “Japan, Rapanui and Chile’s Uncertain Sovereignty” by Grant McCall, *Rapa Nui Journal*, Vol. 9 (1) March 1995, Easter Island Foundation, Los Osos, CA, USA; see also “Declassified documents of the United States embassy” obtained from the archives of the *Museo Antropológico P. Sebastian Englert*, MAPSE, Easter Island, personal records.

⁴¹⁵ N. 138, 196.

By way of preliminary conclusion, despite the fact that administrative regulations were enacted by Chile which would demonstrate its will to possess, it cannot be stated that Chile was willing to possess before 1953. Chile left the island under the abusive and arbitrary control of the company until 1953 when it changed the nomenclature from ‘company island’ to ‘Navy Island’.⁴¹⁶ Chile did not respond as expected before such arbitrary regulations until 1966: insiders were living in an island without permission to leave it voluntarily.⁴¹⁷ All the people who died between 1944 and 1958 in the attempt to reach freedom reflected the pain felt by the desperate who cannot any other solution to the pitiful situation than to take suicidal or at least temerary measures.⁴¹⁸

In the case of *Cameroon v Nigeria*, the ICJ has argued against the position of estimating ‘that peaceful possession coupled with acts of administration may in the absence of protest found the basis or a title by way of historical consolidation’.⁴¹⁹ Moreover, the ICJ has estimated that a twenty years period of state effective activity is ‘too short’.⁴²⁰ Furthermore, Shaw argues that in the case of absence of legal title (the Rapanui case) the *effectivités* ‘must invariably be taken into consideration’.⁴²¹

‘The acquiescence of a party directly involved is also a very important factor in providing evidence of the effectiveness of control.’⁴²²

In the *Island of Palmas* case, Judge Huber noted that effectiveness will depend also on ‘the geographical nature of the region, the existence or not of competing claims and [...] international reaction’.⁴²³ Hence, for example the UN recognition or opposition to validate an ‘unlawful acquisition of territory’ is significant.⁴²⁴ It is said that the UN has been willing to include Rapanui in the process of decolonisation. The prescription in this case cannot be

⁴¹⁶ N. 138, 197.

⁴¹⁷ N. 6, II, 64-65.

⁴¹⁸ Islander’s watercrafts were improvised in extreme.

⁴¹⁹ N. 317, 441.

⁴²⁰ N. 317, 441, footnote 181.

⁴²¹ N. 317, 436.

⁴²² N. 317, 442.

⁴²³ N. 317, 441, footnote 182.

⁴²⁴ N. 317, 442.

considered long enough therefore is arguably to be running in favour of Chile. Besides there have been many internal protests against the political administration of the island.

Utis Possidetis

In respect of the exercise of effective occupation, both the nature of the territory inhabited or reachable from the continent and the *uti possidetis* rationale must be taken into account. The island is one of the most isolated places on earth therefore the distance of the territory in this case may benefit the Chilean position. Nevertheless, with the *uti possidetis* argumentation the matter is different. According to Shaw, *uti possidetis* ‘posits that a new state has the boundaries of the predecessor entity.’⁴²⁵ Article 1 of the Chilean Constitution of 1833 never contemplated the territory of Rapanui as part of it.

*‘El territorio de Chile se extiende desde el desierto de Atacama hasta el Cabo de Hornos, i desde las cordilleras de los Andes hasta el mar Pacífico, comprendiendo el Archipiélago de Chiloé, todas las islas adyacentes, i las de Juan Fernández.’*⁴²⁶

‘The territory of Chile extended its domains from the Atacama Desert to the Cape Horn and; from the Andes Mountains to the Pacific Ocean, comprehending the archipelago of Chiloe all the adjacent islands and; the Archipelago of Juan Fernandez.’

When Chile became independent in 1818 its boundaries were defined by the Roman idea of *uti possidetis* frontiers. *Uti possidetis* portrays the idea of what the Spanish empire effectively colonised and occupied until the independence of its colonies in the early 19th century. Today it is a principle of international law. In the case of independent Chile, the Constitutions of 1828 and 1833 officially confirmed that the boundaries reached not far from the Juan Fernandez archipelago which is 500 kilometres away from mainland Chile. Even though the Constitution was in force until 1925 and was several times amended, it never included Rapanui. One of the reasons is that the mainlander “consciousness” awakening about Easter Island began much later. As I argue, in constitutional terms, the island became effectively part of the geographical Chile in 1966. Before that the island was practically abandoned to the sheep ranch administrators and its acts were acquiesced in by Chile through the Navy.

⁴²⁵ N. 317, 431.

⁴²⁶ N. 355, article 1 of the Constitution of 1833.

The Easter Island Act No 16.441 of 1966

Although initially one could say that Chile started its “effective control” regarding prescription in 1896, 1916, 1917 or 1953, to me the critical date is 1966. In 1966, for the very first time the Congress enacted a statute concerning the political, administrative and judicial situation of Easter Island according to the constitutional law in force. In practical terms, it was not until the enactment of the still in force *Ley Pascua*, No 16.441 of 1966 or “Easter Island Act”⁴²⁷, that the island was fully incorporated to the Republic of Chile: a fact which coincides in time with the peoples’ awakening in the 1950s.⁴²⁸

The previous decrees and statutes were just antecedents to the final constitutive act of colonisation, the concrete institutionalisation of the Chilean exercise of power in the island. The most important legal act occurred in constitutional terms when the legal existence of the natives of Rapanui was recognised on equal conditions to Chileans from the mainland. The so-called “*naturales*”⁴²⁹ became full Chileans citizens with equal constitutional rights.⁴³⁰

Unlike the previous years of legal proto-colonisation the island became politically administered according to the Chilean constitutional system (art. 1). It also became judicially incorporated into Chile since for the very first time a Tribunal of Letters (art. 6) was created to establish the rule of law in the island (superseding the naval jurisdiction which till then had administered justice even against constitutional provisions⁴³¹). Likewise, a formal City Council (art. 4) was set up and an electoral system (art. 22) to allow the locals to vote on national elections was established for the very first time.

As Shaw highlights when commenting on the *Rann of Kutch* case, the assertion of sovereignty depends on the nature of the exercise of sovereignty. Sovereign’s rights and duties differ

⁴²⁷ *Ley Pascua* No 16.441 in URL: <http://www.leychile.cl/Navegar/?idNorma=28472&idVersion=1966-03-01&idParte>

⁴²⁸ N. 138, 196.

⁴²⁹ Article 38 of *Ley Pascua* refers to island-born citizens as *naturales*.

⁴³⁰ McCall, n. 334, 118.

⁴³¹ The article 80 of the Political Constitution of 1925 ordered that the faculty to judge civil and criminal matters tribunals belonged exclusively to the tribunals established by law. Neither the President nor the Congress may exercise judicial functions [...] *La facultad de juzgar las causas civiles y criminales pertenece exclusivamente a los tribunales establecidos por la ley. Ni el Presidente de la República, ni el Congreso, pueden, en caso alguno, ejercer funciones judiciales, avocarse causas pendientes o hacer revivir procesos fenecidos.* See *Political Constitution of the republic of Chile of 1925* in URL: <http://www.leychile.cl/Navegar/?idNorma=131386&idVersion=1925-09-18&idParte>

considerably depending on time, place, and the particular political system.⁴³² The constitutional system of Chile is republican. The main formal source of law is written law especially through statutes. Unlike the executive “decrees” that emanate from administrative authorities, statutes or *leyes* are the formal representation of the popular will of the republican democracy. Hence, according to Shaw, the case must be evaluated according to the legislative measures adopted, and in this case the prominent is dated 1966. The Easter Island Act was the first complete Act of both legal colonisation and integration. Before, the *Ley 3220* there was only a proto-colonial attempt to annex the island.

During the early twentieth century the lease of territories was a way of obtaining control of strategic territories without annexing.⁴³³ The case of Rapanui under the international law practice would be unique due to its unilateral nature: only one state asserting doubtful title against no one. Unilateral acts are evidence of the point of view of the state in question. According to Shaw, ‘while not [a] source of international law’ they might be a source of international obligation and the state might be judged according to its unilateral acts.⁴³⁴

The argument of unilateral nature of these acts and the favourable consequences which according to law apply to the Rapanui rights notwithstanding, I argue that the case might be of a bilateral nature if the thesis of Rapanui statehood is assumed. It is true there has been no opposition from foreign states against Chile’s assertion of sovereignty on the island but, the constant uprisings of the indigenous population of the island might account as well as the amount of possession and settlement which has been significant only from 1966 onwards. Besides, the international community, according to Teodoro Ribera, has been in the past willing to include Easter Island in the C-24 list.⁴³⁵

The Private law type of the *proto-colonial* period (1888-1966)

⁴³² N. 317, 435.

⁴³³ N. 317, 459.

⁴³⁴ N. 317, 115.

⁴³⁵ “Segundo Informe de la Comisión de Constitución, Legislación y Justicia y Reglamento”, *Boletines Nos 2.526-07 y 2.534-07* de 18 de marzo de 2003, pp. 1 – 594 [Senado, 2003]: 23. Acordado en sesiones celebradas los días 7 y 14 de mayo; 4, 11 y 18 de julio; 2, 9, 16 y 30 de julio; 6 y 13 de agosto; 3 y 10 de septiembre; 2, 8, 15, 28 y 29 de octubre; 5 de noviembre; 3, 10 y 17 de diciembre, todas del año 2002; 7, 14 y 22 de enero, y 11 y 18 de marzo de 2003, con asistencia de sus miembros Honorables Senadores señores Andrés Chadwick Piñera (Presidente), Marcos Aburto Ochoa, Alberto Espina Otero, Rafael Moreno Rojas y Enrique Silva Cimma. Sala de la Comisión, a 18 de marzo de 2003. Nora Villavicencio Gonzalez, Abogado Secretario. URL: <http://www.cecoch.cl/htm/materiales/tpl/11.pdf>.

Finally I would like consider the Chilean public proto-colonialism (1888-1966) as a private law type of colonialism. In 1933 after complicated judicial battles and amid competing claims to the ownership of lands of the island which confronted the sheep company and the government, the whole island and its immovable property was inscribed as owned by the *Fisco chileno*, paradoxically, on the basis of occupation of *terra nullius* according to article 590 of the Civil Code.⁴³⁶

The *Fisco* is the State of Chile performing private transactions as legal person for private law purposes. In my opinion, the *Fisco* is not the legal owner because the inscription is void: The argument of *terra nullius* is inconsistent with the Chilean position of acquisition by cession. Since opposition to this *inscripción de dominio* or registration of title has existed from the time the people have been aware of it, the time of prescription is not running against Rapanui interests.⁴³⁷ Going further by following the theory of inexistence the inscription does not exist since there is no valid reason or *causa jurídica* at law to appropriate the land.

This illegal act of appropriation of ancestral Rapanui lands was realised through the register of public lands in the mainland city of Valparaíso⁴³⁸ and cancelled to be done again by duplication in the new register of public lands of Easter Island in 1966.⁴³⁹ The Chilean government's official stance argues that the inscription of 1933 is explained by a desire to protect Rapanui interests from foreign interests and not because there was a public *animus* of appropriation. If that is so, then why was the 1933 inscription done again in 1966 bearing in mind that since 1953 there was no longer a foreign sheep farming company trying to appropriate the lands under its control?

As I said before Enrique Merlet got in 1896 the Chilean governments' approval to administer and exploit the island. Twenty years later he was trying to register the lands which according to his view did not belong to the state of Chile.⁴⁴⁰ In 1933, the *Fisco* registered in its own name the land when confronted with CEDIP's apparent better rights its

⁴³⁶ N. 10, 125.

⁴³⁷ Francisco Haoa Pakomio once told me that the people became aware of the public inscription of fisco-ownership just recently in the early 1980s. Before that they did not know that it even existed.

⁴³⁸ N. 138, 187.

⁴³⁹ N. 427. The Easter Island Act of 1966 created the public notary of Easter Island and the public land register of the *Conservador de Bienes Raíces*. In its first page the register replicated the Valparaíso inscription of 1933 by saying that the whole island was owned by *fisco*.

⁴⁴⁰ N. 331, 166 anexo XXXIII.

will to own the same lands. During the 1910s when Merlet tried to register the lands in the public land register of Valparaiso he found government judicial opposition to his administrative request.⁴⁴¹ While the tribunals were resolving to whom the lands of the island belonged, the Ministry of External Affairs made a decree, the *Temperamento Provisorio* of 5 May 1917⁴⁴² according to which the island was being leased again to CEDIP. Only in 1929 the lease was ended by the Ministry of Defence arguing the company pretension of having better rights over the island's property.⁴⁴³ According to Fisher, the president of Chile 'was planning legally to inscribe all of Easter Island as property of the republic alone', but the company resisted and nothing was achieved⁴⁴⁴ until 1933 when a commission persuaded the government 'to inscribe all of the Isla de Pascua as national property before the nations of the world.'⁴⁴⁵

The complicated contractual relationship between the state of Chile and the CEDIP ended in 1953. By that time all doubts on the island's land ownership have been removed. In 1966 through the *Ley Pascua* the inscription of 1933 was cancelled and renewed in the register of public land of Easter Island.⁴⁴⁶ In my opinion, none of those legal private transactions which originated in Toro and later Merlet's purchases of lands, can be argued as jurisdictional acts of the state. Acts of jurisdiction should not be confounded with contractual acts. Therefore, whether or not there was Chilean effective control from 1896 or 1966, these acts do not count for determining the mode of acquisition of sovereignty of the island according to international law.

Reframing the Rapanui people: Nationality rather than ethnicity

I argue against articles 1 and 2 of the *indigenous act No 19.253 of 1993*⁴⁴⁷ which depict the Rapanui people as Chilean ethnicity. This is due to the fact that I think they should be regarded rather as nation. The legal consequence of that distinction is fundamental

⁴⁴¹ Through the *Oposición a inscripción, rol 15691*. N. 331, 167 anexo XXXIV.

⁴⁴² N. 331, 183, anexo XXXVI.

⁴⁴³ N. 331, 186, anexo XXXVII.

⁴⁴⁴ N. 138, 185.

⁴⁴⁵ N. 138, 187.

⁴⁴⁶ Fojas 1 Numero 1 del Registro de Dominio del Conservador de Bienes Raíces de Isla de Pascua. Refer to Jacobo Hey Paoa, *Conservador de Bienes Raíces de Isla de Pascua*, Rapanui, Chile.

⁴⁴⁷ N. 5, and N. 584.

regarding the judicial case developed in chapter four and the application of the correspondent statute. The fact that insiders' citizenship was obtained only after the enactment of the *Ley Pascua* (which responded, in turn, to a political reaction provoked in Chile after the island's revolt of 1964-65⁴⁴⁸) makes sense in the light of the historical evidence. The historical facts show contrasting national roots of Chileans vis-à-vis Rapanui. According to Xabier Alvo, the people of Easter Island are 'tenuously linked to Chilean history.'⁴⁴⁹ Nelson Castro⁴⁵⁰ wondered whether to bother writing the history of an island which had never belonged to the history of the Chilean nation: 'Why write about populations and territories over which we do not have vital experience, either colonial or post-colonial?'⁴⁵¹

The question of ethnicity and nationality must be addressed by contextualising the debate. The determination of the scope of application of the term "peoples" in the context of international law, appears relevant. According to James Anaya, the term "peoples" due to its link with the principle of self-determination has been traditionally understood

'in the sense of a limited universe of narrowly defined, mutually exclusive communities entitled a priori to the full range of sovereign powers, including independent statehood.'⁴⁵²

To Anaya, there are three variants to restrict the controversial scope. The second and the third are more contemporaneous but the first variant '[...]' only applies to the populations of territories that are under conditions of classical colonialism.⁴⁵³ Although Anaya considers it as insufficient, the classic variant is for my purposes essential to understand the Chilean colonialism on Easter Island: Subjugation of locals by alien domination which, in other

⁴⁴⁸ "We are merely asking for respect. The reformulation of ethnicity in Rapa Nui (Easter Island 1966)" by Alejandra Grifferos, *Pacific 2000. Proceedings of the Fifth International Conference on Easter Island and the Pacific*, Kamuela, Hawai'i, August 7-12, 2000, Easter Island Foundation, Los Osos, CA, USA, edited by Christopher M. Stevenson, Georgia Lee, F. J. Morin, pp. 377-381, 2000, 378.

⁴⁴⁹ "Andean People in the Twentieth Century" by Xavier Alvo in *The Cambridge History of the Native Peoples of the Americas Volume III, South America, Part 2*, edited by Frank Salomon and Stuart B. Schwartz, Cambridge University Press, pp. 765-871, 1999, 871.

⁴⁵⁰ Castro, n. 401. Nelson Castro Flores is a Chilean historiographer who wrote a thesis on the Angata uprising of 1914.

⁴⁵¹ Castro, n. 401, 7.

⁴⁵² *Indigenous Peoples in International Law* by James S. Anaya, Second Edition, Oxford University Press, New York, 2004, 100.

⁴⁵³ Anaya argues that the classical-first variant was implicit in India's reservation to the article 1 of the International Covenant on Civil and Political Rights. To India, self-determination "'appl[ies] only to the peoples under foreign domination and [...] not apply to sovereign independent States or to section of people or nation—which is the essence of national integrity". N. 452, 117, note 26.

words, means political, cultural and economic suppression of insiders' prerogatives in favour of the political, economic, legal, judicial and social control coming from people who do not identify themselves with the nationality of the people of the namely independent territory.

One of the three features of John Rawls' philosophical-liberal concept of "the Law of Peoples" (in terms of principles guiding the 'mutual political relations between peoples'⁴⁵⁴) is cultural.⁴⁵⁵ To conceptualise peoples as cultures, John Rawls followed J. S. Mill's concept of nationality. According to Rawls, Mill uses the 'idea of nationality to describe a people's culture.'⁴⁵⁶

"A portion of mankind may be said to constitute a Nationality, if they are united among themselves by common sympathies, which do not exist between them and any others—which make cooperate with each other more willingly than with other people, desire to be the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively. This feeling of nationality may be generated by various causes. Sometimes, it is the effect of identity of race and descent. Community of language, community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are necessarily sufficient by themselves."⁴⁵⁷

The desire of be governed by themselves; the identity of race and descent; the community of language, beliefs; geographic limits; community of historical recollections are amongst those from which Rapanui people identify themselves. Also to be highlighted is that Mill's characterisation of nationality as culture fairly represents the contrasting roots which exist between the people of Chile and the people of Easter Island.

⁴⁵⁴ Or the 'particular political conception of right and justice that applies to the principles and norms of international law and practice.' *Law of the Peoples* by John Rawls, Cambridge, Mass.: Harvard University Press, 1999, 3 and 3 footnote 1.

⁴⁵⁵ N. 454, 23.

⁴⁵⁶ N. 454, 23, footnote 17.

⁴⁵⁷ N. 454, 23, footnote 17 quoting J. S. Mill (1862) *Considerations on Representative Government*, ed. J.M. Robson (Toronto: University of Toronto Press, 1977), in *Collected Works*, vol. XIX, chap. XVI, p. 546.

According to Alfred Cobban, one of the difficulties of accepting the collective right of self-determination ‘arises from the problem of finding a definition for the nation.’⁴⁵⁸ According to his view, ‘the nation is a community that is, or wishes to be, a state.’⁴⁵⁹ He stated that although nationality theorists have been incapable of building one objective concept, it is possible to trace common elements:

‘Language, religion, traditions, territorial contiguity, natural frontiers, economic interests, race [...]’⁴⁶⁰

The place of birth is also a ‘decisive characteristic’⁴⁶¹ but not enough to Cobban because ‘the only certain test [...] is essentially subjective’⁴⁶². To him, any ‘territorial community’ in which the members

‘are conscious of themselves as members of a community, and wish to maintain the identity of their community, is a nation.’⁴⁶³

In the case of Rapanui through Cobban’s conceptualisations, either objective or subjective elements are present. The majority of the indigenous people of Rapanui self-identify themselves first as Rapanui and only after that as Chileans.⁴⁶⁴ Besides, the national-political identity is manifested through the autonomous desire of becoming an independent polity, or in Cobban’s words, a state.

According to Jennings, the matter of nationality is related to the territorial change. The transference of the portion of earth’s surface, and its resources from one regime to another involves decisive changes ‘in the nationality, allegiance and way of life of the population’.⁴⁶⁵ For the case of Rapanui I argue this has been happening strongly since 1966.

⁴⁵⁸ *The Nation-State and National Self-Determination* by Alfred Cobban, Thomas Y., Crowell Company, New York, Apollo edition, 1970, 107.

⁴⁵⁹ N. 458, 108.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ The sole factual detail of writing in a legal document that “I Jose X, Chilean, declare that...” sometimes has provoked quarrels with the Easter Island Notary’s functionaries since some people instead prefers that the official writes “I Jose X, Rapa Nui-Chilean, declare that...” In my legal work I witnessed that several times.

⁴⁶⁵ *The acquisition of territory in International Law* by Robert Y. Jennings, Manchester, England: Manchester University Press; New York: Oceana, 1963, 3.

The right of political self-determination of *nations*.

Before a senatorial committee in 2003, the former Director of Legal Affairs of the Ministry of Foreign Relations of Chile, Mr. Claudio Troncoso, in the context of international law, explained what were the possible consequences of conferring constitutional recognition on the indigenous populations as “peoples of Chile” within the constitutional rationale of the Republic of Chile.⁴⁶⁶ He argued that there was no univocal sense for a expression (peoples) which therefore has experienced some evolution throughout time.⁴⁶⁷ To him the word *pueblos* has been historically related to the right of self-determination and distinguishes between ‘peoples subdued under colonial (racist or foreign) domination’ to whom, as subjects of the international legal order, international law confers the right of exterior self-determination and, ‘peoples constituted (organised or integrated) within the state’ on whom international legal order only confers internal self-determination.⁴⁶⁸ To the first situation of peoples subdued under colonial rule, the state which is controlling the territory in question is seen by the international law as not the legitimate representative of those who inhabits it. On the other hand, peoples constituted within the state are seen as being legitimately represented by the state, and the principle of territorial integrity is privileged in order to avoid any pretension of secession of particular minorities within the state.⁴⁶⁹

The Rapanui situation perfectly fits into the first situation of peoples subjugated by a colonial foreign domination. An interpretation of the UN resolutions concerning decolonisation through the lens of the island’s history shows that the Rapanui were never and by no circumstances part of the process of construction of the national identity or boundaries, as officially depicted, especially since the enactment of the 1993 Indigenous Act. According to article 2 of the Indigenous Act, indigenous peoples are persons of Chilean nationality who are in the following cases:⁴⁷⁰

⁴⁶⁶ N. 435.

⁴⁶⁷ N. 435, 11.

⁴⁶⁸ N. 435, 12.

⁴⁶⁹ N. 435, 12.

⁴⁷⁰ N. 5, article 2: *Se considerarán indígenas para los efectos de esta ley, las personas de nacionalidad chilena que se encuentren en los siguientes casos: a) Los que sean hijos de padre o madre indígena, cualquiera sea la naturaleza de su filiación, inclusive la adoptiva; Se entenderá por hijos de padre o madre indígena a quienes descendan de habitantes originarios de las tierras identificadas en el artículo 12, números 1 y 2; b) Los descendientes de las etnias indígenas que habitan el territorio nacional, siempre que posean a lo menos un apellido indígena; Un apellido no indígena será considerado indígena, para los efectos de esta ley, si se acredita su procedencia indígena por tres generaciones, y c) Los que mantengan rasgos culturales de alguna etnia indígena, entendiéndose por tales la práctica de formas de vida, costumbres o religión de estas etnias de un modo habitual o cuyo cónyuge sea indígena. En estos casos, será necesario, además, que se autoidentifiquen como indígenas.*

In the same manner, another prominent constitutionalist lawyer Teodoro Ribera affirmed before that same senatorial committee that contrary to the idea of “ethnicity”, “peoples” has to be thought as ‘a group of individuals who belonging or not to an ethnicity have the conviction of constituting a unity different to others.’⁴⁷¹ This is a very interesting element added by Ribera which detaches the idea of race from the concept of nationality. I argue that this is the case of Easter Islanders, who historically used to regard themselves as a country of people having as secondary element of consideration the fact of ethnic origin (this may explain partially why today several of the so-called traditional surnames are foreign names⁴⁷²).

The trans-ethnic understanding used to transcend the narrowing depiction of the 1993 *Ley Indígena*. Before the Indigenous Act enactment, the still-in-force *Ley Pascua* 16.441 of 1966, and the *Decreto Ley* or Law-Decree No 2885 of 1979 used to denominate as *naturales* or *originales* the people born on Easter Island regardless of their blood-line descent.⁴⁷³ These Acts therefore used the principle of *ius solis*, that is, the place of birth to determine and distinguish the law applicable between insiders and outsiders. This may also explain, yet only partially, Ribera’s acknowledgement that the United Nations has shown some interest to incorporate Rapanui in the process of decolonisation!⁴⁷⁴

During the early 1990s when the Indigenous Bill was being discussed, some Rapanui resisted being seen as *indígenas*, since they argued they were Polynesians.⁴⁷⁵ Regardless of their resistance the 1993 Act established the ethnicity of Rapanui (as any other Chilean indigenous community) as Chilean-indigenous as long as one of two principles were fulfilled by the individual: the principle of *ius sanguinis* or the principle of cultural self-recognition. They opposed again. A more radicalised island sector showed fierce resistance to even contemplating the possibility that non-Rapanui Chileans might apply for a strip of land since they may self-recognised as Rapanui due to their link by marriage with a blood-line descent

⁴⁷¹ N. 435, 18.

⁴⁷² Cardinali, Pont, Calderon, Edmunds or Rangitaki are family names adopted from foreign surnames. Today they are considered Rapa Nui’s surnames; see “Anexo: Te ingoa Rapanui”, *Las Fundaciones de Rapanui* by Grant McCall, edición del Museo Antropológico Sebastian Englert, Chile, 1986.

⁴⁷³ N. 427, article 38. Also see article 1 of *Decreto Ley No 2885* of 1979 URL www.leychile.cl/Navegar/?idNorma=7028&idVersion=1993-10-05&idParte.

⁴⁷⁴ N. 435, 23

⁴⁷⁵ N. 10, 199.

Rapanui.⁴⁷⁶ In other words, they opposed because in their minds they saw possibility that mainlanders posing as Rapanui could have access to land ownership. Due popular rejection it ‘took a full five years’⁴⁷⁷ before the law came into force in 1998.

As I have argued in chapter two there are some people of Rapanui who knowing ancient concepts are partially incapable of distinguishing clearly between the western concepts of sovereignty and land ownership. It come to be clear that they did not want further foreign hands controlling more of their “unified” concept towards land: The *kainga* which already had been usurped by the *Fisvo*, in 1933 and 1966, and previously lost by cession through the Deed 1888. To those the meaning of the original (before the 1998 reform) *Ley Indígena* was going to be to give away more sovereignty and more land ownership to Chile and its people.

Following the thesis presented in chapter two, a paradoxical fact emerged. From my point of view, even though the Rapanui were trying to protect what to them is sacred or very political, *benua*, the only result they got was the creation of another element of social division and more colonialism than before. Previously, I was told⁴⁷⁸, the island people did not differentiate regarding blood-quantum percentages but by the cultural involvement of the named person. This makes sense if we see the constitution of modern families.⁴⁷⁹ Many of them came from foreign surnames. Today, most (not to say all) of the families are mixed-blood. Foreigners were seen as guests and if the people’s love was gained they became another Rapanui with rights to participate in political affairs and perhaps by getting some “loose” control over a piece of land. Through the *ius sanguinis* discrimination what the Indigenous Act has caused is today a vicious social contest concerning who is more Rapanui than the other or who is more pure than the other.⁴⁸⁰

Paraphrasing Teodoro Ribera, the concept of self-determination has suffered several stages of chronological evolution. From just being a “principle” it became a “right” in 1952 through the UN Resolution 637. Then, the UN Resolutions 1514 of 1960 and 2200 of 1966

⁴⁷⁶ N. 10, 201.

⁴⁷⁷ N. 10, 202.

⁴⁷⁸ Personal communications with Jorge Pont Chavez and Francisco Haoa Pakomio.

⁴⁷⁹ See Chapter IX of *RAPANUI. Tradition and Survival on Easter Island* by Grant McCall, 2nd edition, Allen & Unwin, Australia, 1994; also N. 138, 150.

⁴⁸⁰ This social issue is reinforced by another legal provision of the indigenous act which permits mixed-blood Rapanui to place their “Rapanui” surname before the “foreign”. This is an exception to the rule of the Civil Code which requires that children have first their father’s name and secondly their mothers’.

came to reaffirm equally the right of self-determination of peoples, especially through the latter resolution which approved the International Covenant on Civil and Political Rights of 1966. It was through Resolution 2625 of 1970 when the conceptualisation of the collective right was narrowed to be applicable only to the colonies and through that denying validity of application to existing states.⁴⁸¹

In 1966, the Easter Island Act caused public expectations in the mainland, and was regarded as very positive in the advance of Rapanui's overcoming of Chilean colonialism by reason of the recognition of their basic political rights and freedoms and human rights in general. Furthermore, the inclusion of Rapanui in the Indigenous Act was also looked upon as positive in the sense of further process of integration in the polity of Chile. However, the legal consequences of both are negative from the perspective of their right to political self-determination. On the one hand, the *Ley Pascua* was the beginning of the final stage of political subjugation. On the other, through the Indigenous Act, the legal consequence of becoming "ethnic" was detrimental too to the Rapanui interests on self-determination. People characterised as ethnic are subordinated to one fundamental principle of international law: the principle of territorial integrity of states. The principle of territorial integrity of states,

‘appears to conflict on the face of it with another principle of international law, that of the self-determination of peoples.’⁴⁸²

If accepting that X people are ethnics of other nation-state, the principle of territorial integrity legally prevails over the possibly just claim to political self-determination. On the contrary, if X people are a nation, the right of decolonisation prevails over the principle of territorial integrity of states. Therefore, by proper interpretation of the factual and legal evidence the ethnic understanding should be superseded in the case of the Rapanui people. Through the current understanding the Rapanui became automatically no longer entitled to recover their sovereign right of external self-determination, that is, the right to politically determine authorities, laws and judiciary, but rather were converted into a legal Chilean ethnicity which, in terms of entitlement, means aspiring only to the right of internal self-

⁴⁸¹ N. 435, 19 – 21.

⁴⁸² N. 317, 443 doing reference to the *Burkina Faso v. Mali*, ICJ report (1986).

determination, at best. If my proposition were accepted the logical consequence might alter today's theoretical understanding and consequently the political approach to the theme.

I am arguing that the indigenous people of Rapanui are a colony in the sense of the resolutions recalled by Ribera. Easter Island is entitled to the collective right to be decolonised. Also I argue that the people of Easter Island are being wrongly depicted as of Chilean ethnicity. The ethnic concept introduced in the 1993 Act was followed by the CVHyNT report of 2003 and recently reaffirmed by the respective ratifications of both the Convention concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organization, [C-169]⁴⁸³ and the UN Universal Declaration on the Rights of Indigenous Peoples, [UDRIP].⁴⁸⁴

According to article 1.1.b C-169 the Convention applies to,

‘peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries...’.

In my opinion, according to this logic C-169 should not apply to Rapanui people for all the reasons presented in this chapter (eg. the *utis possidetis* principle).

According to article 1.3 of C-169,

‘The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.’

This means that indigenous peoples in independent countries are entitled only to internal, cultural, or ethnic self-determination and not political self-determination. Article 1 No 3 in Rapanui language reads: the *Haka Tano O Te ILO 169 O Runga I Te Tangata Hakatere Tuai O Te Henua: Te anga inga I rote ta'toa'a me'e o te vananga nei* “He Tangata Henua” *ina ko ai pe nei ee he me'e ati o e tabi hibi hibi te me'e parauti'a hanga o raua mau'a I rote ara o te henua ta'ato'a.*⁴⁸⁵

⁴⁸³ N. 322.

⁴⁸⁴ N. 323.

⁴⁸⁵ N. 322 article 1 No 3 translated into Rapanui by Clementina “Kere” Tepano Haoa. *Haka Tano O Te OIT 169 O Runga I Te Tangata Hakatere Tuai O Te Henua.*

Article 3 of the UDRIP declares that,

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

Article 45 of the UDRIP declares that,

‘Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.’

Both, articles 3 and 45 seemed very promising and were the reason why Australia initially voted against this Declaration, exactly by reason of the reference to self-determination.⁴⁸⁶

The problem is with article 46.1 of the UDRIP,

‘Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.’

I think that both the C-169 treaty and the UDRIP declaration are, from a Rapanui decolonising perspective, a political neo-colonial ersatz. The law of cultural self-determination of ethnicities, on which Rapanui leaders focus their activism nowadays⁴⁸⁷, is useless from my point of view. Hitherto, the 1993-ethnic reframing (and its international replications) went unnoticed. By following conspiracy theory argumentations, one may think that the ethnic depiction was a strategic move of the state of Chile. The Rapanui came to be part of the Chilean identity as nation-state and no longer should Chile worry about

⁴⁸⁶ ‘Australia’s representative said his Government had long expressed its dissatisfaction with the references to self-determination in the text. Self-determination applied to situations of decolonization and the break-up of States into smaller states with clearly defined population groups. It also applied where a particular group with a defined territory was disenfranchised and was denied political or civil rights. Australia supported and encouraged the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government.’ See “Major step forward” UN Department of Public Information, News and Media Division, New York, Sixty-first General Assembly Plenary 107th & 108th Meetings (AM & PM) URL: <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>

⁴⁸⁷ For instance, Rafael “Rinko” Tuki Tepano, who in 2007 replaced the former prominent leader Alberto Hotus. He was elected by the Rapanui to represent them, according to the provision of the Indigenous Act. After Chile’s ratification of the C-169 in 2008, he is insisting on implementing the C-169 to protect, according to his view, the Rapanui interests.

decolonisation issues because a gradual integration of its Oceanian first-peoples was on the move. Actually what matters to the international community are mostly severe human rights' breaches.

But, I do not believe in conspiracy theories. While I believe in the good will of those who included the Rapanui ethnicity in the Indigenous Act, and of those left-wing supporters who pushed for the ratification of the C-169, I am also a witness of the nearly sickly attitude of my fellows, who are searching for roots to unify us as nation.⁴⁸⁸

From a Chilean perspective the Rapanui people, as a people-nation, as a nationality, do not exist.⁴⁸⁹ Although culturally protected by the Chilean law they are considered an ethnic group amongst other indigenous ethnicities as depicted by the Indigenous Act of 1993. They are an ethnic population fully deserving of cultural protection within the constitutional logic of the Chilean unitary-nation understanding.⁴⁹⁰ As will be argued next, the Rapanui demand to get their sovereignty and land ownership back, is not unconstitutional because they are not just an ethnicity but a nation with the full collective right of political self-determination according to both international and Chilean law.

⁴⁸⁸ About the factors which fed the Chilean national consciousness during the nineteenth century in "Orígenes de la conciencia nacional chilena" by Ricardo Krebs pp. 3-22 in *Nación y Nacionalismo en Chile. Siglo XIX*, Volumen 1, edited by Gabriel Cid and Alejandro San Francisco, Ediciones Centro de Estudios Bicentenario, Santiago, Chile, 2009. According to the editors, the book is a non-nationalist historiographic study which does not represent the phenomenon of nationalism as "essence" that is as a collective identity with an invariable destiny but as a novel form of collective identification in which as much changes as the continuities have relevance. It is about the Chilean national identity which sees nationalism as a process in constant construction and reconstruction. URL: <http://www.mer.cl/modulos/catalogo/Paginas/2010/04/11/MERSTAT007OO1104.htm>

⁴⁸⁹ In fact, one of the public debates raised by the left-wing parties is nowadays to push for a more comprehensive multicultural point of constitutional departure as elsewhere developed countries, such as Canada, have done.

⁴⁹⁰ This has important consequences which will be analysed in chapter four. They are related to article 5 of the Chilean constitution and the "exhaustion of remedies" through the OAS judicial system.

Chapter four: The OAS decolonisation

Preamble

The thesis argues for the human right of political decolonisation to which the people of Rapanui are entitled. The question now is how put into practice the entitlement. As Gonschor stresses, the application of the law of decolonisation is inconsistent when applied to Hawai'i, Tahiti Nui and Rapanui. This is an attempt to find alternative scenarios as encouraged by Pacific Studies. The thesis develops an interpretation of the law of the Organisation of American States [OAS] to lay the foundations for a future practical implementation of the notional legal argumentations developed hitherto. Nevertheless it is only limited to setting up the basis for filing a case of political self-determination through the OAS judiciary. It is thought that through the OAS judicial system an “OAS judicial decolonisation” might be accomplished. It is argued that before the tribunals of OAS a constitutional debate could be raised based on systematic interpretation of the *Constitución Política de la Republica de Chile* [CPR] vis-à-vis the American Convention of Human Rights [ACHR].⁴⁹¹

Most Chilean constitutionalists agree in regarding universal human rights treaties, of which Chile is signatory, as a source of constitutional law as provided by the CPR itself. Moreover those same scholars argue that these constitutional rules would have a prominent place in the hierarchy of the Chilean legal order. This has a series of legal and political consequences. Therefore, the process of decolonisation becomes attainable. The constitutional-legal dispute between two different nations would be the common situation in an imaginary trial, Chile and Rapanui debating on who has the right to govern the destiny of the “Island of Easter”.

I contend that the right of political self-determination of peoples though not expressly mentioned or guaranteed by the ACHR or by CPR is indeed a right protected by those bodies of law, therefore, capable of being vindicated before a court of law. The thesis examines how the hierarchical interrelations amongst international laws on human rights and

⁴⁹¹ *American Convention on Human Rights, Pact of San Jose Costa Rica* [ACHR] adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22nd November 1969. URL: <http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm> .

the relationship of these and the Chilean municipal law operates in favour of the Rapanui case for political decolonisation. I am postulating that through a process of integration of sources of law, namely: OAS treaty law; the United Nations [UN] human rights law, and the CPR, we can find legal “windows” to build a judicial case and, ultimately trigger, through courts of law, the initiation of the process of decolonisation of Easter Island from its controller “administrative power”, the state of Chile.

Upon these bases we will imagine a case before the Inter-American Commission on Human Rights [IACHR], the place where persons or a group of persons may lodge petitions concerning states parties’ acts or omissions which might be violating rights recognised in the ACHR or other applicable instruments. The petition before the IACHR would contain a request for Chile’s compliance with article 73 (e) of the UN Charter and other norms concerning political self-determination, by means of transmitting to the UN General Assembly information related to the colonial status of Easter Island. The IACHR would recommend that to Chile and Chile should comply. In the event of Chilean state opposition, that is, Chile’s neglecting to action the IACHR’ recommendation, ultimately, the IACHR could consider referring the case to the Inter-American Court of Human Rights [the Court] for a final decision binding on Chile. The hypothetical result, in practical terms, is believed to have the ability to push official recognition, and result in a voluntary commitment from Chile before the C-24 or, at least, give extra strength to the island’s wish for self-government.⁴⁹²

By ‘Means of Protection’ according to article 33, Chapter IV of the ACHR,

‘CHAPTER VI - COMPETENT ORGANS

Article 33

The following organs shall have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties to this Convention:

- (a) the Inter-American Commission on Human Rights, referred to as “The Commission;” and
- (b) the Inter-American Court of Human Rights, referred to as “The Court.”

One obstacle that an international case like this will find is the requirement of prior exhaustion of domestic remedies as a condition of admissibility for presentations filed before the IACHR. This is linked with another but only apparent obstacle which is the need of lodging petitions within a period of six months following the date of notification of the final internal instance. The thesis argues the inexistence of proper procedural ways to protect the

⁴⁹² N. 10, 195. ‘Rapanui wishes for political autonomy have not been taken sufficiently into account.’

alleged right in Chile according to municipal provisions, then it must be proved this case falls into the exception contemplated in articles 31 and 32 of the Rules of Procedure of the IACHR and article 46 of the ACHR, which allow lodging lawsuits ‘within a reasonable period of time’.⁴⁹³ The municipal remedies capable of possible utilisation are reviewed at the end of this chapter.

The other obstacle is found in Chapter II of ACHR which details the civil and political rights protected by the OAS judicial system. The right of political self-determination of peoples is not recognised explicitly there as one of the rights able of being alleged judicially.⁴⁹⁴ Nevertheless, a more elaborate interpretation will conclude that the human right of political self-determination of peoples, which is guaranteed in diverse UN instruments (especially the ICCPR⁴⁹⁵) is an integral of the ACHR due to the interpretation of the Inter-American Court elaborated in 1982.⁴⁹⁶ Moreover, I am arguing that the UN laws on decolonisation bind Chilean state organs because they have been integrated into the Chilean law by means of article 5 of the CPR.

This chapter also reviews the doctrines of incorporation and transformation to argue that article fifth of CPR, according to the *doctrina Nogueira*, has incorporated, automatically, the human right of political self-determination of peoples into the Chilean legal order since 1989. And, if not, the right has been already transformed into internal law through binding treaties, namely the ACHR since 1990, and the ICCPR since 1976 or 1989. Furthermore, I am asserting that the human right of political self-determination of peoples is a right protected not only by ACHR or CPR but also according to articles 62, 64, 68, 29 (b) of ACHR, articles 1, 4, 5 of the ICCPR, several resolutions of the UN General Assembly, the reservation made by Chile by virtue of article 62 of ACHR, and, the 1982 Inter-American Court verdict, all of which are reviewed further below. As a consequence, state organs should undertake measures to ensure for the Rapanui people the exercise of their right, or to comply with any recommendation of the IACHR and ultimately to implement any binding

⁴⁹³ RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009. URL <http://www.cidh.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm> .

⁴⁹⁴ N. 493, article 23.

⁴⁹⁵ N. 320.

⁴⁹⁶ Which is analysed further below.

sentence of the Court, in order to initiate the process of decolonisation through the UN Committee on Decolonisation, C-24 of which Chile is member since 1962.⁴⁹⁷

This analysis begins with some brief thoughts on the relationship between international and municipal laws based on the ACHR. This thought are based on the preamble and the first articles of the Convention. Then, it will be analysed the role of the two judicial OAS organs, the *ipso facto* binding force of the Court sentences on Chile, and the interpretation of the Court regarding “Other Treaties” applicable through the ACHR. Then, the thesis analyses article 5 of the CPR, the constitutionalisation of human rights in the Chilean legal order and the relationship with American and universal instruments on human rights. Finally, it is reviewed the issue of exhaustion of internal feasible remedies along with a brief exposition of them.

‘Article 1 Obligation to Respect Rights

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

For the purposes of this Convention, “person” means every human being.

Article 2 Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.’

Aims

International law seeks equal relations between states. In particular, since the establishment of the UN and its body of treaties on human rights, international law has aimed to shelter fundamental rights from government acts and omissions which may violate or jeopardise them. The fact that states assert national sovereignty over individuals and communities no longer implies that persons who were afflicted by arbitrary or illegal decisions, decrees, or sentences do not have the right to solicit subsidiary protection when municipal provisions were not enough to correct the *imperium* of law. Following the trend and through several agreements of the governments American states have committed themselves to performance in accordance with the international law of human rights. The principle of action, in the case

⁴⁹⁷ UN GA resolution A/RES/1810 (XVII) of 17 December 1962. URL: www.un.org/documents/resga.htm.

of American states, is to declare on *a priori* inclination to limit sovereign prerogatives of the state, namely legislative, executive and even judicial for the sake of human rights.

In the Preamble of the ACHR when reaffirming their willingness to consolidate democratic institutions, personal liberty and social justice, States signatories recognise the necessity to comport themselves based on the essential rights of man which they assert are not derived from being a national of a certain state, but from the fact of simply being human. These rights escape the absolute control of nation-states' sovereignty by means of proclaiming that the ACHR, also called *Pacto de San Jose de Costa Rica*, was not a mere capricious decision of 'New World'⁴⁹⁸ nation-states but supported by analogous instruments of a universal nature.⁴⁹⁹ The ethical validity therefore of the agreement would be worldwide. The American states when presuming the pre-existence of essential rights under which they situate themselves as sovereigns, in legal terms, are making reference to imprescriptible and inalienable human rights.⁵⁰⁰ The protection of these rights starts with the limitation of national sovereignties by the human rights universal rationale. The international post-WWII tendency is reflected likewise in the CPR when it proclaimed on whom the exercise of national sovereignty is bestowed and, how it ought to be exercised. As will be shown the natural law⁵⁰¹ premise of ACHR-essential rights existence was taken up by the doctrine of article 5 of CPR through its equivalent Spanish phrase: *derechos esenciales* or essential rights.

The ACHR Preamble gives shape to this declaration of wills. Articles 1 and 2 of the ACHR establish that states parties commit themselves to put into practice in their respective legal orders the 'rights and freedoms' recognised in ACHR when legal municipal vacuums exist. This is consistent with article 27 of the Vienna Convention of the Law of Treaties when prescribing that states parties 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'⁵⁰² For the ACHR, international protection is

⁴⁹⁸ The New World concept comprehends the idea of Creole people of European cultural background ruling American nation-states to the detriment of the indigenous populations. N. 13, 20-21.

⁴⁹⁹ The ACHR was not just a consequence of UN post-WWII law but also the result of a long-term dream which began more than two hundreds years ago in cradle of aristocratic *elites criollas*.

⁵⁰⁰ In legal terminology, "imprescriptible" signifies that there are some rights unable to be taken away by prescription or by lapse of time. Likewise, "inalienable" refers to the concept of a nonnegotiable right which unable to be taken away from or given away by the possessor.

⁵⁰¹ In the context of positivism and natural law dispute.

⁵⁰² Article 27. Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46. See *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, Treaty

achieved by means of reinforcement and complementing of the judicial protection given by domestic legal provisions. Yet later, this will mean not only reinforcement or complementing of municipal law but also its potential replacement when human rights are threatened by matters of a municipal nature.

International and municipal arenas

The ACHR has established a system of integration of sources between OAS and UN norms on human rights and, between international and municipal laws, rights and competences, according to ACHR articles 29 and 64. These norms are important for the case because they provide the legal ground for the advisory opinion of Inter-American Court which in 1982 interpreted article 64 in the light of article 29 to conclude that the human rights protected by the OAS law encompass human rights guaranteed in universal bodies to which American states were parties.

‘ACHR

CHAPTER IV - SUSPENSION OF GUARANTEES, INTERPRETATION, AND APPLICATION

[...]

Article 29 Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

- a permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

[...]

CHAPTER VIII - INTER-AMERICAN COURT OF HUMAN RIGHTS

Section 2, Jurisdiction and Functions

Article 64

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

[...]

The OAS also created a body of substantive and procedural norms to protect a person or a group of persons from particular actions or policies which might be infringing human rights guaranteed by the ACHR. This integration between international and municipal competences by no means implies an OAS verdict's enforcement on the country involved. But, in theory, if human rights were jeopardised by domestic decisions (adopted by executive, legislative or judicial organs) the ultimate decision of the Court, which might conflict with those, will prevail over municipal provisions if the country involved has agreed to recognise the binding force of the Court's verdicts.

'ACHR
CHAPTER VIII - INTER-AMERICAN COURT OF HUMAN RIGHTS
[...]
Section 2, Jurisdiction and Functions
[...]
Article 62

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement. [...]

Chile signed the ACHR 22 November 1969. Nevertheless, Chile is a party only since 21 August 1990 when it deposited the instrument of ratification.⁵⁰³ On the basis of article 62 of the ACHR, Chile made a reservation. In that statement, Chile recognised *ipso facto* the jurisdiction of the Court. This is fundamental for the case of Rapanui decolonisation. The **reservation of Chile** was:⁵⁰⁴

'a) The Government of Chile declares that it recognizes, for an indefinite period of time and on the condition of reciprocity, the competence of the Inter-American Commission on Human Rights to receive and examine communications in which a State Party alleges that another State Party has committed a violation of the human rights established in the American Convention on Human Rights, as provided for in Article 45 of the Convention.

⁵⁰³ Inter-American Commission on Human Rights, Annual Report N° 42/08, ADMISSIBILITY, PETITION 1271-04, KAREN ATALA AND DAUGHTERS, CHILE, 23rd July 2008. URL: <http://www.cidh.org/annualrep/2008eng/chile1271.04eng.htm> .

⁵⁰⁴ "DECLARATIONS/RESERVATIONS/DENUNCIATIONS/WITHDRAWALS. B-32: AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA"". URL: <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> .

b) The Government of Chile declares that it recognizes as binding, *ipso facto*, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention in accordance with its Article 62.

In making these declarations, the Government of Chile places on record that this recognition of the competence and jurisdiction of the Commission applies to events subsequent to the date of deposit of this instrument of ratification or, in any case, to events which began subsequent to March 11, 1990. Moreover, in acknowledging the competence and jurisdiction of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, the Government of Chile declares that, when these bodies apply the provisions of Article 21.2 of the Convention, they may not make statements concerning the reasons of public utility or social interest taken into account in depriving a person of his property.⁷

Transformation, incorporation and the *ipso facto* binding

In the United Kingdom, according to Shaw, the role of international law before municipal courts is answered by two currents of thought⁵⁰⁵: the *doctrine of transformation* and the *doctrine of incorporation*. The *doctrine of transformation* maintains that there are two different systems of law operating separately thus 'before any rule or principle of international law can have any effect within domestic jurisdiction, it must be expressly [...] 'transformed' into municipal law by the use of the appropriate constitutional machinery, such an Act of the Parliament.' The *doctrine of incorporation* maintains that 'international law is part of the municipal law automatically without the necessity for the interposition of a constitutional ratification procedure'.⁵⁰⁶

The ACHR might be taking elements from both doctrines:

By *ipso facto* incorporation, article 29 (b), article 64 and article 68 allow integration of existing and diverse instruments of an international nature regarding human rights and, it does the same for municipal and international laws.

By transformation and by means of articles 62 and 45 it demands *a priori* recognition of the country involved to be bound by the Inter-American Court's jurisdiction and recognition of IACHR's competence to receive and examine communications between State Parties.

⁵⁰⁵ N. 317, 120-174 Chapter 4, International and municipal law.

⁵⁰⁶ N. 317, 129.

According to article 45 of the ACHR, the same demand of recognition of competence runs for the IACHR when disputes between States were lodged.⁵⁰⁷

‘CHAPTER VII - INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

[...]

Section 3, Competence

Article 44

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Article 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

[...]

CHAPTER VIII - INTER-AMERICAN COURT OF HUMAN RIGHTS

[...]

Section 3, Procedure

[...]

Article 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of the judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.’

According to article 62 (1), state parties to be bound by, may recognise ‘as binding *ipso facto* and not requiring special agreement, the jurisdiction of the Court, on all matters relating to the interpretation or application of this Convention.’⁵⁰⁸ In the case of Chile’s recognition as provided by article 62 (1), Court verdicts are binding internally in the country involved without the need of further statutory action, Parliament’s sanction, or judicial *exequatur*. By *ipso facto* recognition the international jurisdiction of the Court is recognised as if pronounced by a municipal court.

Chile’s *ipso facto* binding recognition is a reflection of the recognisable basis of the *politica exterior* of Chile of absolute respect to international law and especially to the treaties signed

⁵⁰⁷ We will not analyse state vs. state controversies because it is beyond our interest of person vs. state cases.

⁵⁰⁸ Also see article 62 (2) which to us is not relevant since Chile’s recognition was done in the terms of the article 62 (1).

by Chile. Former president Bachelet recently declared to the media⁵⁰⁹ that Chile ‘has a basic rule which is to fulfil all its international undertakings’ and that Chile ‘is fully committed to complying’ with Inter-American Court sentences.⁵¹⁰

IACHR and The Court

On the one hand, according to article 1 (1) of the Rules of Procedure of the Inter-American Commission on Human Rights, the IACHR is ‘an autonomous organ of the Organization of American States whose principal functions are to promote the observance and defense of human rights and to serve as an advisory body to the Organization in this are.’⁵¹¹ Equally, according to article 1 of the Statute of the Inter-American Commission on Human Rights, the IACHR ‘is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.’⁵¹² According to article 41 of the ACHR, the main function of the IACHR is the promotion of ‘respect for and defense of human rights’.

‘Article 41

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- (a) to develop an awareness of human rights among the peoples of America;
- (b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- (c) to prepare such studies or reports as it considers advisable in the performance of its duties;
- (d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- (e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- (f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- (g) to submit an annual report to the General Assembly of the Organization of American States.’

⁵⁰⁹ According to Shaw (N. 317, 78) ‘...the obvious way to find out how countries are behaving is to read the newspapers [...]’.

⁵¹⁰ *Chile tiene como regla básica cumplir todos sus compromisos internacionales [...] en la comunidad internacional se ha entendido con claridad que la soberanía tiene como límite los derechos esenciales que nacen de la naturaleza humana. De ahí nuestro compromiso con cumplir a cabalidad lo que la Corte sentencia respecto de nuestro país, por norma y por convicción.* See “Bachelet ratifica respeto de Chile a fallos de la Corte Interamericana de derechos Humanos” in *La Tercera online*. URL: http://www.latercera.cl/contenido/23_67922_9.shtml.

⁵¹¹ N. 493.

⁵¹² STATUTE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, approved by Resolution N° 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979. URL <http://www.cidh.org/Basicos/English/Basic17.Statute%20of%20the%20Commission.htm>.

The competence of the Commission is set out in article 44 of the ACHR and complemented by article 23 of the IACHR Rules of Procedure of the Inter-American Commission on Human Rights.

‘ACHR

Article 44

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

RULES OF PROCEDURES IACHR,

Article 23. Presentation of Petitions

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights “Pact of San José, Costa Rica”, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belém do Pará”, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in a separate document.’

According to article 51 (2) of the ACHR,

‘where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.’

Article 1 and 2 of the Statute of the Inter-American Court of Human Rights⁵¹³ rules on the Court’s jurisdiction and its adjudicatory and advisory functions,

‘CHAPTER I

GENERAL PROVISIONS

Article 1 Nature and Legal Organization

The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.

Article 2 Jurisdiction

The Court shall exercise adjudicatory and advisory jurisdiction:

1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and
2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention.’

⁵¹³ STATUTE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution N° 448). URL <http://www.cidh.org/Basicos/English/Basic19.Statute%20of%20the%20IA%20Court.htm> .

According to article 61 of the ACHR, only states parties and the IACHR have the right to submit cases to the Court. The Court only receives cases submitted by the IACHR or by state parties. According to article 63 (1) of ACHR, if the Court finds that any right or freedom protected by the ACHR has been violated, it shall rule ‘that the injured party be ensured the enjoyment of his right or freedom [...]’ and also if appropriate shall rule ‘that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.’

Persons or group of persons do not have the right to petition directly to the Court.

According to articles 48 to 50 of the ACHR, a series of procedures must be followed before the case reach to the Court. Article 61 (2) of the ACHR refers to them. Article 63, refers to how the state involved should proceed after the verdict of the Court.

The extent of Chile’s recognition and the Advisory Opinion *OC-1/82*⁵¹⁴

According to article 44, and Chile’s 1990-reservation, Chile recognised the IACHR competence to receive denunciations or complaints from any person or group of persons for events occurred in Chile ‘subsequent to the date of deposit of this instrument of ratification or, in any case, to events which began subsequent to 11 March, 1990.’

In the case of the adjudicatory and advisory jurisdiction of the Court, Chile did not make reservation of conditionality. Chile recognised the jurisdiction of the Court as binding *ipso facto*. The question is whether Chile *ipso facto* accepted as binding an Advisory Opinion done in 1982, eight years before Chile ratified the ACHR. Could it be said that without any reservation from Chile, the jurisdiction of the Court was integrated into the Chilean legal order? Would the previous jurisprudence of the Court come to be automatically part of the Chilean legal system? According to article 62 (3) of the ACHR,

‘The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.’

⁵¹⁴ “Advisory Opinion OC-1/82, September 24, 1982. ‘Other Treaties’. Subject to the consultative jurisdiction of the Court (Article 64 American Convention on Human Rights)” pp. 1-13, by *Inter-American Court of Human Rights 1982*, URL: http://www.corteidh.or.cr/docs/opiniones/serica_01_ing1.pdf.

In 1982 the Inter-American Court gave an advisory opinion on the scope of application of article 64 (1) of the ACHR. The meaning of the phrase “other treaties”. By following the provisions of article 64 (1) the Peruvian Government requested the Inter-American Court of Human Rights the following legal interpretation:

‘How should the phrase “or of other treaties concerning the protection of human rights in the American states” be interpreted?’

With respect to this matter, the Government of Peru requests that the opinion cover the following specific questions:

Does this aforementioned phrase refer to and include:

- a) Only treaties adopted within the framework or under the auspices of the inter-American system? Or
- b) The treaties concluded solely among the American states, that is, is the reference limited to treaties in which only American states are parties? Or
- c) All treaties in which one or more American states are parties?⁵¹⁵

The Court’s Advisory Opinion OC-1/82 was:

‘Firstly: By unanimous vote, that the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.’⁵¹⁶

Point number 42 of the Opinion is an example of how the Court founded its decision on the matter and article 29 of the ACHR:

‘42. It is particularly important to emphasize the special relevance that Article 29 (b) has to the instant request. The function that Article 64 of the Convention confers on the Court is an inherent part of the protective system established by the Convention. The Court is of the view, therefore, that to exclude, a priori, from its advisory jurisdiction international human rights treaties that are binding on American States would weaken the full guarantee of the rights proclaimed in those treaties and, in turn, conflict with the rules enunciated in Article 29 (b) of the Convention.’⁵¹⁷

According to Shaw, the Court ‘took the view that the object of the Convention was to integrate the regional and universal systems of human rights protection and that, therefore,

⁵¹⁵ N. 514, 2 – 3.

⁵¹⁶ N. 514, 12.

⁵¹⁷ N. 514, 10.

any human rights treaty to which American states were parties could be the subject of an advisory opinion.⁵¹⁸

Hierarchy of formal sources of international law

In the hypothetical case of the Inter-American Court considering whether Chile has breached the law on self-determination, it will be based on its own 1982 Advisory Opinion. It should decide based on the norms related to self-determination of peoples which as human rights are said to be imprescriptible and inalienable as much as of *erga omnes* universal applicability.

“Judicial decisions” are ‘to be utilized as a subsidiary means for the determination of the rules of law⁵¹⁹ (which would be the case for the Advisory Opinion *OC-1/82* when interpreting the scope of article 64 of the ACHR⁵²⁰). “Law-making treaties” or the ‘agreements whereby states elaborate their perception of international law upon any given topic or establish new rules which are to guide them for the future in their international conduct⁵²¹ when interpreted in the light of “custom”, are the primordial sources of international law⁵²². Then, when this is complemented with “state practice” or ‘how states behave in practice⁵²³ and “opinion juris”⁵²⁴ it is clear that members of the OAS should comply with the dispositions established in other treaties where international obligations for states have been set forth.

According to Shaw, the Inter-American Court has said that⁵²⁵,

[...] human right treaties were different in nature from traditional multilateral treaties, since they focused not upon the reciprocal exchange of rights for the mutual benefit of the contracting

⁵¹⁸ N. 317, 360.

⁵¹⁹ N. 317, 103.

⁵²⁰ I am not discussing here on the binding force or simply *auctoritas* of the Advisory Opinion. I am pointing out that the Court’s interpretation on article 64 of the ACHR may not be binding but it serves as basis for the imaginary case of OAS-Rapa Nui decolonisation. Thanks to Dr. Joel Colon-Rios, for his feedback.

⁵²¹ N. 317, 90.

⁵²² N. 317, 116.

⁵²³ N. 317, 78.

⁵²⁴ ‘The belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law’. N. 317, 80.

⁵²⁵ See the sentence of the Inter-American Court of Human Rights, *The Effect of Reservations*, n. 317, 360 footnote 249.

states, but rather upon the protection of the basic rights of individuals. The obligations were *erga omnes*, rather than with regard to particular other states.⁵²⁶

In terms of hierarchy of sources, according to Shaw, treaties and custom are the most prevalent sources but ‘a treaty will be void “if at the time of its conclusion, it conflicts with a peremptory norm of general international law”⁵²⁷, that is a norm of *jus cogens*. Norms which are “non-derogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and cannot be preempted by treaty”⁵²⁸. According to Shaw, the ICJ has qualified the right of self-determination as unquestionably of *erga omnes* character.

‘The Court emphasised that the right of peoples to self-determination was “one of the essential principles of contemporary international law”⁵²⁹

This is interesting in the scenario of Rapanui people under OAS scrutiny. Should the imprescriptible right of collective self-determination of Rapanui as of *erga omnes* character be considered to this case?

According to OC-1/82, the extension of the human rights rationale is not confined to the ACHR but also embraces any human right treaty under which the American state members are committed through the international human rights system. The right of self-determination of peoples even though non-explicitly recognised by ACHR is incorporated, by integration, in the ACOHR according to both the text of article 29 (b) and according to the Advisory Opinion OC-1/82. In my opinion, since Chile recognised the *ipso facto* jurisdiction of the Court without reservations, it is possible to use this jurisprudence to imagine a case of Rapanui OAS decolonisation. Since the Court wants to signify that other universal treaties concerning human rights are part of the OAS system despite the fact of their “legal origin”. For us, this is true not only by taking the advisory opinion of the Court but also following the statements contained in article 5 of the CPR.

Dualism and Monism

⁵²⁶ N. 317, 360.

⁵²⁷ N. 317, 117 quoting article 53 of the Convention on the Law of Treaties.

⁵²⁸ N. 317, 117 footnote 208, quoting the US v. Matta-Ballesteros case.

⁵²⁹ N. 317, 229.

A propos of the role of municipal rules vis-à-vis international law and between international and domestic spheres, a conflict may emerge when,

‘the state within its own domestic spheres does not act in accordance with its obligations as laid down by international law. In such case, the domestic position is unaffected (and is not overruled by the contrary rule of international law) but rather the state as it operates internationally has broken a rule of international law and the remedy will lie in the international field, whether by means of diplomatic protest or judicial action.’⁵³⁰

This eclectic view of Shaw is extracted from dualism and monism. On the one hand, the “state dissidence” is respected by international law but, on the other, opens the doors in international arenas for ‘denunciations or complaints’⁵³¹ against state dissidence. There are theoretical and practical difficulties generated by state refusal of compliance with international law. The question turns on legal hierarchies and supremacies between international and national spheres of jurisdiction⁵³² which from a human rights perspective is of fundamental importance.

From a dualist perspective, the supremacy of the state is assumed as the basis upon which two different orders, national and international, function. It ‘[...] stresses that the rules of the two systems [...] exist separately and cannot purport to have an effect on, or overrule, the other.’ On the other hand, of the *monists* who believe in a unitary law, there are two sub-categories: the naturalist stance of Lauterpacht who ‘upholds a strong ethical position [...] and others, like Kelsen, who maintain a monist position on formalistic grounds.’

‘Thus, Kelsen emphasises the unity of the entire legal order upon the basis of predominance of international law by declaring that it is the basic norm of the international legal order which is the ultimate reason of validity of the national legal order.’⁵³³

⁵³⁰ N. 317, 123.

⁵³¹ Paraphrased from article 44 of the ACHR.

⁵³² ‘With the rise and extension of international law, questions begin to arise paralleling the role played by the state within the international system and concerned with the relationship between the internal legal order of a particular country and the rules and principles governing the international community as a whole.’ N. 317, 121.

⁵³³ N. 317, 123.

The Lauterpacht approach is ‘characterised by deep suspicion of an international system based upon the sovereignty and absolute independence of states...’ whereas Kelsen’s approach ‘utilises the philosophy of Kant as its basis’.⁵³⁴

The article 5 of the CPR⁵³⁵

The article 5 of the CPR, contains two paragraphs (*incisos*):

The first paragraph reads,

‘La soberanía reside esencialmente en la Nación. Su ejercicio se realiza por el pueblo a través del plebiscito y de elecciones periódicas y, también, por las autoridades que esta Constitución establece. Ningún sector del pueblo ni individuo alguno puede atribuirse su ejercicio.’

‘Sovereignty resides essentially in the Nation. It is exercised by the people by means of plebiscite and periodical elections and, also, by the authorities established by the Constitution. No sector of the people or individual may claim for itself the exercise of that sovereignty.’

The second paragraph of article 5 of the CPR originally had only one sentence: ‘The exercise of sovereignty recognises, as a limitation, respect for the essential rights emanating from human nature’. Nine years after its formulation, a second sentence was added. Today, the second paragraph or *inciso segundo* reads,

‘El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes.’

‘It is the duty of state organs to respect and promote those rights, guaranteed either through the Constitution or by international treaties ratified and in force in Chile.’

In 1989 fifty-four constitutional amendments were negotiated just before the regime of Pinochet (1973-1990) came to an end.⁵³⁶ Basically, the *54 reformas* were aimed to democratize institutions established in the Pinochet’s original constitution of 1980 without having to

⁵³⁴ N. 317, 122 – 123.

⁵³⁵ CPR in *Dto. 100 de fecha que fija el texto refundido, coordinado y sistematizado de la Constitución Política de la Republica de Chile*, promulgada el 17 de septiembre de 2005 y publicada en el Diario Oficial el 22 de septiembre de 2005, Originalmente Constitución Política de la Republica de Chile de 1980, URL: <http://www.bcn.cl/leyes/pdf/actualizado/242302.pdf>.

⁵³⁶ The so called *transición a la democracia* began soon after the Pinochet regime was defeated in the urns through the plebiscite of 1988. The People exercised sovereignty and voted against Pinochet’s continuity in office. Thus, the right-wing administration and the centre-left wing parties (also called the *Concertación de Partidos por la Democracia*, CPD) negotiated the so called “54 reforms” and one of these was the second part of the article 5.

replace the entire charter: to build a peaceful transition from a dictatorial regime to a participative democracy of left-wing parties.⁵³⁷ The *Ley de Reforma Constitucional numero 18.825* had one article. It reads:

‘1. — En el artículo 5º, agrégase la siguiente oración final a su inciso segundo:

‘Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes.’⁵³⁸

Hence, the constitutional amendment of article 5 prescribed the conditions through which international laws on human rights would come to be integrated into the CPR: As long as the treaty in question had been ratified and the treaty is in force. By 1989 there were several “ratified and non in force” treaties. The ICCPR was one of them.

Writers or ‘the teachings of the most highly qualified publicists of the various nations’ are, according to article 38 of the Statute of the ICJ, subsidiary ways for the determination of the rules of international law. According to a Chilean writer, Jorge Tapia, by saying ‘guaranteed either through the Constitution or by international treaties ratified and in force in Chile’, the drafters of the amendment wished to stress that the constituent power was actually aware of the existence of human rights treaties at the date of the constitutional reform in 1989.⁵³⁹ In consequence, the government could not obliterate, by any means, the validity of those instruments within Chile regardless of their lack of entry in force. Constitutionally, to be in force as law of the republic, international treaties have to be promulgated and published.⁵⁴⁰ However, in the 1989 reformers’ *travaux préparatoires*⁵⁴¹ it seems that the drafters wanted to signify that treaties ratified by Chile are binding on the state organs even before their internal entry in force. Thus, by “ratified” they meant to signify that the state accepted the rights guaranteed in those ratified-not-in-force instruments as binding despite the absence of promulgation and publication in Chile.

⁵³⁷ The CPD coalition, by that date, was integrated by left-centre wings parties. Christian Democrats, Socialists, Humanists, Radicals and Communists were amongst others. Some of these parties which were willing to enact a new charter represented all that Pinochet detested. But, since the CPR allowed Pinochet to keep his position as Commander in Chief of the Army and, quorums for constitutional amendments were too high (still they are) the winning coalition had to consent with Pinochet in a political loophole to balancing the reformist spirit.

⁵³⁸ *Ley de Reforma Constitucional numero 18.825* Publicada en el Diario Oficial con fecha 17 de agosto de 1989. URL: <http://www.bcn.cl/histley/lfs/hdl-18825/HL18825.pdf>.

⁵³⁹ “Efectos de los Tratados sobre Derechos Humanos en la jerarquía del orden jurídico y la distribución de competencias: Alcances del nuevo inciso segundo del artículo 5º de la CPR de 1980” by Jorge Tapia Valdes, *Revista Ius et Praxis*, Vol. 9, no 1, 2003: 355. URL <http://redalyc.uaemex.mx/redalyc/pdf/197/19790117.pdf>.

⁵⁴⁰ N. 535, articles 72 and 75.

⁵⁴¹ N. 317, 141

This well-intentioned goal, according to one of the 1989 reform drafters Francisco Cumplido⁵⁴², which was the way out negotiated with Pinochet's jurists, came to challenge several legal aspects related to the harmony of the constitutional precepts. Like Tapia, he also argues that the drafters expressly did not resolve the uncertainty between international and internal dates of entry in force. Mainly by reason of the regime's systematic violation of civil and political rights during the previous years, they did not wish to jeopardise the reform.⁵⁴³ In other words, the drafters realised the legal inconsistency of the literal reading of the draft and the difficulties which a theoretical issue like this could generate later, but they insisted in keeping it because vague meanings would give tribunals the opportunity to interpret the meaning of the norm and perhaps incorporate ratified-not-in-force treaties into the legal system.

As a result of the former reasoning, and analysing the binding force and applicability in Chile of the rights and guarantees established in the ICCPR, it was adopted on 16 December 1966, subscribed and signed the 16 December 1969. Chile deposited the instrument of ratification in the UN on 10 February 1972. The decree of promulgation in Chile dates from 30 November 1976 and its publication as law of the republic on 24 April 1989.⁵⁴⁴

The right of political self-determination in the CPR

The acquisition of Easter Island by means of prescription or effective occupation, is occurring in the midst of the post-colonial legal era. From the perspective of acquisitive prescription or effective occupation without complaints of any nature, every day which passes affirms the Chilean presence in Rapanui playing against Rapanui autonomy demands. However, since I argue the contemporaneity of Chilean colonialism of Easter Island, the length of time plays in favour of Rapanui self-determination demands because the greater

⁵⁴² Also Minister of Justice during the government of P. Aylwin (1990-1994).

⁵⁴³ Having in mind the systematic violation of fundamental human rights during Pinochet's regime, the left-centre wing experts who negotiated the drafting of the article 5 amendment wanted to guarantee that human rights, especially the right to life and the fundamental freedoms, were going to be respected even though some of them were not published yet. See "La Reforma Constitucional de 1989 al inciso 2° del artículo 5° de la Constitución: Sentido y alcance de la reforma. Doctrina y Jurisprudencia" by Francisco Cumplido Cereceda, *Revista Ius et Praxis*, Vol. 9, no 1, 2003: 371. URL http://www.scielo.cl/scielo.php?script=sci_issuetoc&pid=0718-001220030001&lng=es&nrm=iso.

⁵⁴⁴ "DTO 778 que promulga el Pacto Internacional de Derechos Civiles y Políticos adoptado por resolución No 2.200, el 16 de diciembre de 1966 y suscrito por Chile en esa misma fecha". URL http://www.leychile.cl/Consulta/Exportar?radioExportar=Normas&exportar_formato=pdf&nombreachivo=DTO-778_29-ABR-1989&exportar_con_notas_bcn=True&exportar_con_notas_originales=True&exportar_con_notas_al_pie=True&hddResultadoExportar=15551.1989-04-29.0.0%23.

the length of time the greater Chilean international responsibility for not taking measures to remedy it. Likewise, albeit manifested in different ways, the constant struggle for self-government and recovery of land ownership impedes the definitive concretisation of colonisation. Also, the right protected here is imprescriptible and inalienable hence no prescription runs to the detriment of Rapanui people's rights.

On the issue of applicability in Chile of the ICCPR and a propos of the Rapanui case, the discussion on whether the ICCPR is law since 1976 or 1989 is irrelevant. The right of political self-determination is internal law since 1976 or 1989 and for our case of political decolonisation we are also arguing contemporaneity and continuous transgression of the norm by acts or omissions of the state organs of Chile. Unlike others rights and guarantees, the right of self-determination consecrated in several UN bodies of norms such as the ICCPR cannot be found in the CPR, or in its 1989 reform. Chapter III of CPR (*De los Derechos y Deberes Constitucionales*) which enumerates the constitutional rights and duties of inhabitants of the republic makes no mention of the political right of self-determination of peoples.

One explanation might be the fact that even though the ICCPR mostly guarantees human rights of the "first generation"⁵⁴⁵ the collective right of self-determination is considered to be of the "third generation" which is something supposedly new.⁵⁴⁶ Another explanation might be strictly cultural.

Part of the Chilean self-understanding, the *mestiza* identity, is to cling to the idea of seeing itself as "the nation"⁵⁴⁷ inhabiting the territory called Chile: a territory which once used to belong to the *indios*, first peoples, who together are today pieces of the ethnic mosaic of European settlers, immigrants and Indians. Part of the *imaginario colectivo* as nation is the *mestizo* notion of mixed-blood inheritance.⁵⁴⁸ As a result, the collective right of the Rapanui nation to politically determine its future collides, at constitutional level, with the Chilean

⁵⁴⁵ Thanks to Dr. Joel Colon-Rios for feedback and clarification on this issue.

⁵⁴⁶ Not to Chile though since its C-24 membership since 1962. N. 497.

⁵⁴⁷ New World nationalism originated in the aristocratic elites of eighteenth century's Europe and sought settler nationhood. Local Creole officials developed a sense of distinctiveness and the notions of citizenship, national flags, anthems and ideals of egalitarianism were first developed in the Americas. N. 13, 19.

⁵⁴⁸ The descendants of European settlers laid claim to a quasi-indigenous identity in relation to Europeans 'back home' which meant an ambiguous imaginary relationship with the indigenous colonized. On the one hand, they constitute basis for claims of national distinctiveness, yet on the other the cultures of the indigenous colonized were regarded as obstacles in the path of achieving a nationhood that followed European models. N. 13, 20.

republican national assertion of one nation inhabiting the republic. The CPR denies the hypothesis on which the case of judicial decolonisation is built: the premise of depicting the Rapanui as a nation struggling for self-determination in the middle of a process of unseen colonialism. Instead of that, Rapanui nationhood is constitutionally ignored by Chile.

By Chilean Acts Easter Islanders are portrayed as ethnic Chileans or as just another piece of the cultural-racial mosaic called Chile. Moreover, the ethnic depiction determines the starting point to rationalise the issue. As covered by ethnicity they fall under the principle of territorial integrity and any attempt at talking of autonomy is turned down. But, beyond the discussion of why the right of self-determination of peoples is not mentioned in the constitution, in practical legal constitutional terms, the starting point of article 5 of the CPR is sovereignty residing, essentially, in “the” Nation. This makes sense for the absence of reference to the indigenous populations, ethnicities or communities, in the CPR. The “one” Chilean nationhood assumption is coherent. Article 3 of the CPR when stating that Chile is an *estado unitario* reinforces the unilinear concept of one-nation one-state: there is only one political corpus within the republic. It also has been reinforced by the argumentation of the consultant John H. Gómez.⁵⁴⁹

Accordingly to J. H. Gómez interpretations, with the Chilean state’s *unitario* character (in contrast to federal) there is no space for political decentralization towards regions and provinces.⁵⁵⁰

CPR

Artículo 3

El Estado de Chile es unitario.

La administración del Estado será funcional y territorialmente descentralizada, o desconcentrada en su caso, de conformidad a la ley.

⁵⁴⁹ “Consultoría Internacional para el asesoramiento en la elaboración del Estatuto Especial para Isla de Pascua. Informe primera visita” by John Harold Gómez, *Banco Interamericano de Desarrollo, BID-Chile*. December 2006, unpublished, personal archives. Refer to John Harold Gomez Vargas, jhg@etb.net.co.

⁵⁵⁰ The core argument for Chilean’s government rejection for political autonomy of the island is based on a constitutional argumentation. It is not possible to grant Easter Island political autonomy due to constitutional impediments: *No obstante la constitución Chilena ordenar la descentralización territorial y funcional, no hace lo mismo en materia de descentralización política (con excepción de la administración comunal por expresa o disposición de los artículos 107 y 108 de la Constitución), lo que en principio impide la elección del ejecutivo regional o provincial mediante sufragio universal. En este sentido se pronuncian los artículos 100 y 105 de la Carta Política Chilena, al establecer que “El gobierno de cada región reside en un intendente que será de la exclusiva confianza del Presidente de la República”; y “En cada provincia existirá una gobernación que será un órgano territorialmente desconcentrado del intendente. Estará a cargo de un gobernador, quien será nombrado y removido libremente por el Presidente de la República.” Ante lo anterior es imperativo concluir, que regímenes de autonomía o descentralización que contemplen la elección por voto popular de la cabeza del ejecutivo en lo Regional o Provincial, no son posible en el caso Chileno, debido a las disposiciones vigentes que regulan el tema, a menos que se apruebe por el Legislador cambios estructurales en el modelo de Estado que permita a los entes territoriales entre otras, gobernarse por autoridades propias.* N. 549.

Apparently when the original constitution was drafted this was not an issue. However, today, there is a counterargument for the interpretation of article 3 of the CPR. According to Eliseo Aja, who was commenting a propos of the political autonomies currently developing in Spain, the doctrine of *estado unitario* does not refer to concepts such as *patria* or nation but rather to the territorial organization of the state. The concepts of unitary and federal state, as he affirms, do not constitute closed and homogenous models but models with variants and nuances and as Kelsen proposed years ago, international states may be arranged between two polar regions of extreme centralism and maximum decentralization. The doctrine of the unitary state, Aja concludes, is but the doctrine of the territorial organisation of the state.⁵⁵¹

Although arguable, the article 3 doctrine of the unitary state still impedes steps towards political autonomy, we still have the strong constitutional statement made by article 5 of the CPR and the constitutional considerations reminded by J. H. Gómez.

Let us reconsider the discussion on international and municipal law integration, how article 5 of the CPR should be interpreted, and whether the right of political self-determination may be found, implicitly, in the Constitution. Since the 1989 reform, doctrinal and jurisprudential debate is prominent amongst Chilean experts on constitutional law. As Shaw has argued, the ‘teachings of the most highly qualified publicists’ are subsidiary means for determining sources of law and are important to influence opinions and interpretations and means of rules.⁵⁵² The scope of application of international treaties in constitutional law, the hierarchical prevalence between these and the rights guaranteed in the constitutional body, the organs and prerogatives affected by potential application of “foreign” laws are, in one sense, all matters of the hierarchy of sources namely international laws on human rights vis-à-vis constitutional guarantees established by municipal laws.

The constitutionalisation of human rights is a point of view shared by most of respected publicists in Chile.⁵⁵³ They say that international laws concerning human rights are *supra constitutional* that is, by mandate of the constitution they are hierarchically above the Chilean Constitution; therefore, if there are any conflicting issues on rights or organs’ competences,

⁵⁵¹ *Los conceptos de estado unitario y federal no constituyen modelos cerrados y homogéneos sino que dentro de cada categoría existen variantes y numerosos matices[...] como propuso Kelsen hace muchos años, que entre los dos polos extremos de máximo centralismo y máxima descentralización se pueden ir colocando todos los estados existentes. EL ESTADO AUTONÓMICO, federalismo y hechos diferenciales* by Eliseo Aja, Alianza editorial, España, 1999, 19.

⁵⁵² N. 317, 105 quoting article 38 of the Statute of the International Court of Justice.

⁵⁵³ Amongst others: Santiago Benadava, Cecilia Medina, Rodrigo Díaz Albonico, Paulino Varas, Salvador Mohor, Jose Luis Cea, Claudio Troncoso, Enrique Evans. N. 543, 372.

international laws on human rights prevail over the CPR. Even more, Jose Luis Cea Egaña, one of original CPR drafters has affirmed that, when applied in Chile, the *jus cogens* has supra-constitutional character.⁵⁵⁴ The leading scholar defending the position of implicit integration of the constitutional text by international human rights laws is Humberto Nogueira. He argues that article 5 of the CPR has established a ‘double-source system of fundamental rights’ because it makes possible the entry of essential rights, not explicitly guaranteed by the constitutional text, into its materiality.⁵⁵⁵ Furthermore, he argues that there is a sort of *retroalimentación* between municipal law and international law bearing in mind that the later comprehends not solely human rights treaties but also, norms of *jus cogens*, and customary international law.⁵⁵⁶

On the other hand, there are some sceptics. The idea of implicit aggregation of international instruments materially into the CPR is not shared by some authors. To Lautaro Ríos, for example, the pretension of raising international treaties to the supreme rank of the Constitution is inadequate. He argues against this *desmesurada*, or ‘extreme’, interpretation of international treaties material integration into the Constitution. He argues that it is incompatible with the system of control of constitutionality (both preventive and repressive) established by the CPR.⁵⁵⁷ According to Ríos, on the one hand, the system would not operable if treaties on human rights “per se” had constitutional rank and, on the other, it would be against the rigid mechanism of constitutional amendment.⁵⁵⁸ It is interesting to note though that even with nuances the majority of doctrine follows the Nogueira doctrine.

Two tribunals of the Republic had given judgments in constitutional matters related to article fifth; the *Corte Suprema* [CS] and the *Tribunal Constitucional* [TC]. Judgments bind only the parties. For other cases they represent no more than guidelines for constitutional interpretation. Thus, when a particular interpretation prevails, rather than being binding law, it has *auctoritas* or the potential of keeping that view for future analogous cases. According to

⁵⁵⁴ N. 543, 372. [...] *el ius cogens tiene un carácter supraconstitucional, es decir, jerarquía superior a la carta fundamental.*

⁵⁵⁵ This system [...] *posibilita el ingreso a la Constitución material de derechos esenciales no asegurados explícitamente por el texto constitucional.* See “Los derechos contenidos en tratados de derechos humanos como parte del parámetro de control de constitucionalidad: la sentencia. Rol N° 786-2007 del Tribunal Constitucional” by Humberto Nogueira. Estudios Constitucionales, Centro de Estudios Constitucionales de Chile, Universidad de Talca, año 5, Numero 2, 2007: 457, URL www.cecoch.cl/htm/revista/docs/estudiosconst/5n_2_5_2007/20_Los_derechos.pdf.

⁵⁵⁶ N. 555, 459.

⁵⁵⁷ N. 543, 372-373 quoting Lautaro Ríos (Ius et Praxis Año 2 No 2).

⁵⁵⁸ ...*los que no serían operables si los tratados de derechos humanos tuvieran un rango constitucional “per se” y, atentarian también contra el mecanismo rígido de reforma de la Constitución* by Lautaro Ríos quoted in N. 543, 373.

Nogueira, unlike earlier cases, the CS and TC adopted the view closest to the majority of *opinio juris*. He argues that the CS adopted the “double-source system” concept in four recent judgments.⁵⁵⁹ According to this approach, human rights laws as assured by international treaties ratified by Chile are part of the material Constitution. International treaties set up limits to the actions of the organs and authorities of the state of Chile. The internal sovereignty of the state is limited by the essential rights of the human person.⁵⁶⁰ All in the light of the *pro homine* principle by which human rights guaranteed by both international and national bodies may not be compartmentalised but are assumed in an integrative and complementary form.⁵⁶¹

Nogueira continues that the CS judged that the integration of international law and municipal law is not only guaranteed by article 5 of the CPR but also by article 1, paragraph 1⁵⁶² and 4 and by article 19 No 26⁵⁶³ of the CPR.⁵⁶⁴ Article 19 No 26 provides for the security of the constitutional precepts that is it guarantees the *essence of the rights*. This means that constitutional guarantees enumerated in Chapter III of CPR cannot be affected by statutory limitations, prerequisites or conditions of any kind. Legal norms which complement the constitutional guarantees cannot affect the constitutional rights in their essence.

In the past the TC (which is the only tribunal dealing with constitutional issues⁵⁶⁵) used to sustain that treaties on human rights were divided Solomon-like between statutory laws and

⁵⁵⁹ N. 555, 461 – 462. Sentencia de la Corte Suprema, Rol N° 469-98, de fecha 9 de septiembre de 1998; Sentencia de la Corte Suprema, Rol N° 559-04, de fecha 13 de diciembre de 2006, considerando 22°; Sentencia de la Corte Suprema de Justicia, Sala Penal, Rol N° 3125-04, de fecha 13 de marzo de 2007; Sentencia de la Corte Suprema de Justicia de 18 de abril de 2007. Rol N° 4.183-06, considerandos noveno y décimo.

⁵⁶⁰ N. 555, 461 – 462 commenting two CS sentences: “Sentencia de la Corte Suprema, Rol N° 559-04, de fecha 13 de diciembre de 2006, considerando 22°” and; “Sentencia de la Corte Suprema, Rol N° 469-98, de fecha 9 de septiembre de 1998, citado por CEA EGANA, José Luis, Derecho Constitucional Chileno, tomo I, p. 236.

⁵⁶¹ ...[L]a soberanía, incluido el poder constituyente y todo órgano o autoridad, está limitada por los derechos esenciales de la persona humana [...] los derechos humanos asegurados por tratados internacionales forman parte de la Constitución material, constituyendo límite a las normas y actuaciones emanadas de órganos o autoridades estatales. N. 555, 458 – 459.

⁵⁶² N. 535, *Artículo 1: Las personas nacen libres e iguales en dignidad y derechos. [...] Es deber del Estado resguardar la seguridad nacional, dar protección a la población y a la familia, propender al fortalecimiento de ésta, promover la integración armónica de todos los sectores de la Nación y asegurar el derecho de las personas a participar con igualdad de oportunidades en la vida nacional.*

⁵⁶³ N. 535, *Artículo 19, La Constitución asegura a todas las personas: No 26: La seguridad de que los preceptos legales que por mandato de la Constitución regulen o complementen las garantías que ésta establece o que las limiten en los casos en que ella lo autoriza, no podrán afectar los derechos en su esencia, ni imponer condiciones, tributos o requisitos que impidan su libre ejercicio.*

⁵⁶⁴ N. 555, eg. Sala Penal Rol N° 3125-04, 13.03.2007.

⁵⁶⁵ Here it is worth recalling that until the constitutional amendment of 2005 the preventive control of constitutionality of statutory laws was realised by the TC whereas the repressive control of constitutionality lay with the CS. The constitutional amendment of 2005 united both controls in favour of the former to the detriment of the latter, therefore today both controls repressive and preventive are exercised by the TC.

constitutional laws: they were represented as posited at *supra legal* level and also at *infra constitutional* level.⁵⁶⁶ However, in 2007, and apparently following the Nogueira doctrine, the TC started to accept the perspective already assimilated by the doctrine though not without introducing new elements to the equation. To Nogueira, ‘what limits sovereignty and municipal law are not the treaties as formal sources of law but the fundamental or essential rights guaranteed or assured by them by means of substantive content.’⁵⁶⁷

The TC perspective accommodated the discussion and rather than being centred on the *objective* hierarchy of sources between international and municipal spheres it focused on the *subjective* right consecrated in the former. By objective hierarchy the international law became to be part of the material constitutional text. By subjective hierarchy, the international law treaty does not become part of the material constitution but only the right consecrated in the former. In other words, there is no more need to sustain that treaties on human rights are *supra* constitutional or even at the constitutional level but solely that the *subjective* right guaranteed by the human right treaty is. On the one hand, human rights guarantees constitute subjective rights of persons and, as such, are part of the objective right contained in the material constitution. On the other, the objective (material) instrument which contains the subjective right it is as such not part of the CPR.

This interpretation saves the debate from stagnation in two strong positions and also solves some but all the apprehensions of Lautaro Ríos as explained above. The “Nogueira doctrine” (and its TC variant) is recently starting to be followed by the Constitutional Tribunal. Nogueira argues that the novel perspective assumed by the TC has contributed, in these respects, to the development of one unique parameter of control of constitutionality and, likewise, by doing so it has contributed as well to legal security and equality in the interpretation and application of the fundamental rights of persons.⁵⁶⁸

⁵⁶⁶ ...que los tratados de derechos humanos se encontraban en un nivel infraconstitucional y supralegal... N. 555, 463, footnote 15, “Sentencia del Tribunal Constitucional sobre el Estatuto de Roma del Tribunal Penal Internacional”, Rol N° 346, de 8 de abril de 2002.

⁵⁶⁷ Lo que limita la soberanía y al derecho interno, no son los tratados en cuanto fuente formal del derecho sino los derechos esenciales o fundamentales asegurados o garantizados por ellos como contenido sustancial. N. 555, 463.

⁵⁶⁸ ‘La sentencia del Tribunal Constitucional, Rol N° 786-2007, de fecha trece de junio de 2007, asume por primera vez esta perspectiva asimilada por la doctrina y por la jurisprudencia de la Corte Suprema de Justicia, contribuyendo con ello al desarrollo de un parámetro único de control de constitucionalidad en la materia, como asimismo contribuyendo a otorgar seguridad jurídica e igualdad en la interpretación y aplicación a las personas de los derechos fundamentales.’ N. 555, 464.

By following this novel perspective and through systematic interpretation of the CPR, ACHR and ICCPR, we could not say then that Rapanui has the right of political self-determination by means of objective materialisation of the ICCPR in the CPR, but that the *subjective* right (of every Rapanui person) contained in it, is protected at the constitutional level. Hence, at this stage we may state that as ordered by article 5 of the CPR, as soon as human rights treaties were ratified and in force in Chile, the *subjective* right guaranteed in international treaties on human rights protects Chilean citizens and all the inhabitants of the Republic at the constitutional level by limiting the exercise of its sovereign power.

Building the OAS decolonisation

The key question here emerges from imagining the IACHR (and later the Inter-American Court) deciding whether Chile has the duty or not to solicit of the General Assembly of the United Nations, the inclusion of Easter Island in the C-24 list. If the Commission would recommend that Chile to transmit information under article 73 (e) of the UN Charter, it should do it by arguing both the constitutionalisation of the right by means of article 5 of the CPR, and the provisions as interpreted by the Court on the application of “Other Treaties” according to article 63 of the ACHR. In the OAS hypothetical scenario the IACHR and the Court would exhort Chile to transmit information according to article 73 (e) of the UN Charter in order to recognise that Easter Island is a colonial territory not subject to the territorial integrity rationale.

Hence, the OAS organs might perfectly pronounce by IACHR-recommendations or Court-binding verdicts based upon the law of decolonisation. According to Shaw, the “law of decolonisation” became “right” in 1966 through Resolution 2200 (XXI), which had begun as “principle” in the 1960 colonial declaration, and complemented by the “Declaration on Principles of International Law” in 1970.⁵⁶⁹

Nevertheless, the reality of Rapanui politics is that the state of Chile through its Ministry of Foreign Affairs has not declared before the General Assembly its will to include Easter Island in the C-24 list.⁵⁷⁰ Chile is aware of the existence of the law of decolonisation at least

⁵⁶⁹ N. 317, 230.

⁵⁷⁰ Viewpoint confirmed by the Chilean ambassador of Chile in New Zealand, Sr. Luis Lillo, personal communication, April 2010.

since it became a member of the Committee on Decolonisation in 1962.⁵⁷¹ The inscription of the colonial territory belongs to the General Assembly which needs a majority of votes (no less than 96).⁵⁷² Before that, the C-24 could do it, in theory, but the Committee acts on the principle of consensus and since Chile is one of the members, it would be impossible to get Rapanui on the list without Chile's agreement.⁵⁷³

In parallel, and following the same thinking the Ministry of Home Affairs, in Chile, has not manifested any openness to the desired political autonomy regardless of the Commission of Truth and New Deal recommendations and the insistent demand of local people. This is partly explained by reason of J. H. Gómez conclusions explained above. By conferring political autonomy Chile could be complying with the UN GA resolutions 1514 and 1541 of 1960 and 2625 of 1970. The latter has established four modes for the implementation of the right of self-determination of peoples: the establishment of an independent state; free association or integration in another state, or the emergence into any other political status freely determined by the people involved.

The implicit rejection by the state organs of Chile is not backed by law because it goes against the principles, norms and spirit of the UN Charter's articles 1; 55; 73 (e) and several resolutions of the General Assembly.⁵⁷⁴

⁵⁷¹ N. 497.

⁵⁷² Sergei Cherniavsky, Secretary Special Committee of 24, United Nations, NY, personal communication, April 2010.

⁵⁷³ Ibid.

⁵⁷⁴ 'UN Charter, Article 1, The Purposes of the United Nations are: [...] 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; CHAPTER IX, INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION, Article 55 With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion; CHAPTER XI, DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES, Article 73 Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: [...] (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.'

Amongst the General Assembly's resolutions on decolonisation which apply to the case of Rapanui are:

1. Res. No: 637 (VII) of 1952, which announces that the right of self-determination of peoples is prerequisite to the full enjoyment of fundamental human rights.
2. Res. 742 (VIII) of 1953, which establishes the factors indicative of the attainment of self-government.
3. Res. 1514 (XV) of 1960 or the *Declaration on the granting of independence to colonial countries and people*, which is the base for the implementation of the right of self-determination and the establishment of the Committee on Decolonisation.⁵⁷⁵
4. Res. 1541 (XV) of 1960, which asserts the principles 'which should guide members in determining whether or not an obligation exists to transmit the information called for under article 73e of the Charter.' For my purposes principle IV⁵⁷⁶ is relevant since Easter Island is geographically 3,750 kilometres away from Chile's mainland and it is not an adjacent island as Juan Fernandez archipelago. Ethnically and culturally Rapanui was nearly completely unconnected to Chile until 1966. Moreover, Chilean culture and ethnicity is related to American indigenous and European background whilst the people of Easter Island have a Polynesian ancestry.

The importance of principle IV when establishing the *prima facie* factor is highlighted in principle V:

'Once it has been established that such *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, others elements may then brought into consideration.'

The meaning of this is quite clear. The determinant elements to consider whether or not an obligation to transmit information under article 73 e) exists are the geographical, cultural and ethnic.

5. Res. 1654 (XVI) of 1961 which set up the Special Committee of seventeen members to 'examine the application of the Declaration, to make suggestions and recommendations on

⁵⁷⁵ The subjugation of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation. It also declared that all peoples have the right to self-determination; by virtue of that they freely determine their political status and freely pursue their economic, social and cultural development.

⁵⁷⁶ 'prima facie there is an obligation to transmit information in respect to a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.'

the progress and extent of the implementation of the Declaration, and to report to the general Assembly at its seventeenth session.

6. Res. 2200 (XXI) of 1966 or the 'International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights'. This treaty is probably the most important body in regard to the Rapanui case because it binds the state of Chile at the constitutional level.

7. Res. 2625 (XXV) of 1970 or the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which established the principle of Equal rights and self-determination of peoples'. One of the aims of it is to 'bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.' It established the modes of implementing the right of self-determination of peoples: the establishment of an independent, free associated or integrated state or 'the emergence into any other political status freely determined' by the people involved.

The right of self-determination is clearly stated in the ICCPR article 1.⁵⁷⁷

Is this right of political self-determination part of the American Convention? Yes, it is. Can I find any essential, subjective right, guaranteed, indirectly, by the law of American States through which we might build a case for political decolonisation in favour of Rapa Nui autonomy demands? Yes, I can. Should the state of Chile solicit the General Assembly the inclusion of Rapa Nui in the C-24 list? Yes, it should. And, since this is unlikely to occur; could I relieve Chile of this duty by replacing its will by the recommendations or binding force of OAS judiciary? Yes, I could. Should not first internal remedies being exhausted? Yes, they should, therefore; why am I stating that there is an impossibility of raising this

⁵⁷⁷ N. 320 'Article 1 (1) All the peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. [...] (3) The State Parties to the present Covenant, including those having responsibility for the administration on Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. Article 4, The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. Article 5 (1) Nothing in the present Covenant may be interpreted as implying for any State, group of persons any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant. (2) No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country by virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize them to a lesser extent.'

before municipal tribunals? Because the feasible procedural municipal routes by which the right of self-determination may be alleged before a Chilean court are difficult and present challenges.

The requisite of internal remedies exhaustion

In this part the possible mechanisms that might be used in Chile prior to consideration by the OAS organs. If the internal mechanisms in Chile can afford due process of law, the IACHR will examine the admissibility of the matter by verifying whether those internal remedies have been exhausted. Then, it will also verify whether the petition was or not lodged within six months from the notification of domestic remedies exhaustion.

The constitutional channels in Chile do not afford due process of law, for the protection of the right alleged by interpretation of articles 31 (2) (a) of the Rules of Procedure of the IACHR⁵⁷⁸ and 46 (2) (a) of the ACHR.⁵⁷⁹

Having in mind the necessity to act promptly because the Second International Decade for the Eradication of Colonialism finishes in 2010⁵⁸⁰, according to articles 31 (2) (c) of the Rules of procedures of the IACHR and 46 (2) (c) of the ACHR, the possible actions in municipal courts of Chile to allege the right of self-determination, would delay a final judgment. Hence, in the hypothesis contemplated by article 32 (2) of the Rules of Procedure, that is as an exception to the need for internal remedies exhaustion, the IACHR will determine ‘a reasonable period of time’ within which the petition should be presented. To do that the IACHR ‘shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.’⁵⁸¹ Chile would probably argue that the era of Chilean state’s colonialism ended in 1966; this destroys the OAS judicial decolonisation case from its beginning.

This thesis argues continuous state breach of the right of self-determination on a daily basis because the fact of colonialism restarts every day. In legal terms the Chilean colonisation

⁵⁷⁸ N. 493.

⁵⁷⁹ N. 491.

⁵⁸⁰ UN GA Resolution 55/146 of 8 December 2000 URL www.un.org/documents/resga.htm

⁵⁸¹ N. 493, article 31.2.a.

counts from 1966 but for judicial purposes it applies to the Chilean legal order only from 1976, 1989 or 1990. In 1976 the ICCPR was promulgated. In 1989 the ICCPR was published. Depending on the interpretation of article 5 of the CPR either of both dates would apply to determine the date from which the Chilean colonialism restarts on a daily basis. The year 1990 is important to consider because the government of Chile recognised the competence and jurisdiction of the IACHR for events which began subsequent to 11 March 1990. Therefore, in the end, even though the ICCPR is in force since 1989, the 11 March 1990 determines the practical point of departure for the judicial case. Chile can be violating the ICCPR from 1976 but the recognition of competence of the IACHR only counts from 1990, therefore for the judicial case the fact of colonialism starts the 11 March 1990.

By reference to indisputable historical facts, and according to article 32 (1) of the Rules of Procedure of the IACHR and article 46 of the ACHR, the IACHR could admit the case. The fact of continuous colonialism in Rapanui is evidenced by the constant struggle of its people and the centralized control from the state of Chile. Likewise, the timing of Chilean legal colonialism has been uninterrupted occurring since 1966; it is therefore contemporaneous. The premise of article 32 (2), applies for ‘those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable’.⁵⁸² And in our case, the applicability is governed by article 31 (1) and 31 (2) (a) of the ACHR.

The impossibility of lodging a petition before a municipal court is explained firstly due to the fact of the nature of the right alleged. As already explained the premise of article 5 of the CPR is arbitrary and therefore arguable in terms of human rights laws. The concept of just one nation inhabiting the territory, in practical terms, determines the constitutional ways by which an inhabitant of the republic can demand protection from state organs’ acts and omissions. It is illogical to demand before a Chilean tribunal that “I am not a national Chilean but on the contrary a Rapanui national”. The “ethnic depiction” confirms this view. Analysis of articles 1 and 2 of the Indigenous Act No 19.253 of 1993 shows, from the beginning, that an ethnic Chilean is firstly Chilean and then culturally indigenous.⁵⁸³ This is critical in the light of the principle of internal self-determination and the principle of territorial integrity of states.

⁵⁸² N. 493, article 32.2.

⁵⁸³ N. 5.

According to article 1 of the *Ley Indígena*, the state of Chile recognises that the indigenous peoples of Chile are the descendants of the human groups which have existed in the territory since pre-Columbian times [...]. The state of Chile recognises as one of the main indigenous ethnicities of Chile the Rapa Nui o *Pascuense* people [...].⁵⁸⁴

Potential mechanisms to allege the right of self-determination before the municipal courts of Chile

There are two potential constitutional mechanisms through which a case could be filed in Chilean courts. The first is the *Recurso de Protección* of article 20 of the CPR. The second is contained in article 93 number 6 of the CPR by means of petition before the *Tribunal Constitucional* [TC].

Chapter III of the CPR “*De Los Derechos y Deberes Constitucionales*” is dedicated to the establishment of constitutional guarantees and constitutional protection by superior courts. A Court of Appeal examines the allegations concerning the protection of some of the guarantees established in article 19. The Supreme Court reviews appeals against the resolutions of the respective Court of Appeal. Article 19 enumerates the rights and article 20 determines which of those are protected constitutionally through the so-called *Recurso de Protección*.⁵⁸⁵

According to article 20 of the CPR,

‘Who by cause of arbitrary or illegal acts or omissions suffer privation, disturbance or menace on its legitimate exercise of rights and guarantees established in article 19, numbers 1, 2, [...] 24 [...] can appear [...] before the respective Court of Appeal, which will adopt immediately the necessary measures to re-establish the rule of law and to assure the due protection of the affected,

⁵⁸⁴ N. 5, artículo 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 Alacahuje y Yámana o Yagán de los canales australes. El Estado valora su existencia por ser parte esencial de las raíces de la Nación chilena, así como su integridad y desarrollo, de acuerdo a sus costumbres y valores.

Es deber de la sociedad en general y del Estado en particular, a través de sus instituciones respetar, proteger y promover el desarrollo de los indígenas, sus culturas, familias y comunidades, adoptando las medidas adecuadas para tales fines y proteger las tierras indígenas, velar por su adecuada explotación, por su equilibrio ecológico y propender a su ampliación.’

⁵⁸⁵ Not every one of the constitutional guarantees established in article 19 is protected by the *Recurso de Protección* of article 20.

without prejudice of other rights capable to be claimed before the authority or the appropriate courts.’

I argue the possibility of using paragraphs 1º, 2º and 24º as being linked to the right of external self-determination of peoples. Article 19 of the CPR guarantees,

‘1º, El derecho a la vida y a la integridad física y psíquica de la persona.’

‘1º, the right to life and the right to the physical and moral integrity of persons.’

By following the logic of the ICCPR preamble, a state organ’s denial of the collective right of self-determination constitutes an attack on the moral integrity of Easter Islanders. People are not happy when spiritually deprived of the enjoyment of their collective right. Culturally, the indigenous peoples of Easter Island cannot be viewed as complete as individuals until collectively their social well-being is achieved. An individual’s well-being is associated with the welfare of their kin.

2º.- La igualdad ante la ley. En Chile no hay persona ni grupo privilegiados. En Chile no hay esclavos y el que pise su territorio queda libre. Hombres y mujeres son iguales ante la ley. Ni la ley ni autoridad alguna podrán establecer diferencias arbitrarias;

‘2º, Equality before law. In Chile there is no privileged person or groups. In Chile there are no slaves and any who arrives on its territory will be freed. Men and women are equal before law. Neither statutory act nor any authorities are allowed to establish arbitrary differences;’

This guarantee is linkable to the “first” generation right of political freedom. Even though it seems clear that the reference is to individual rather than collective freedom, the constitutional right established in this paragraph could be interpreted in the wider collective sense.

‘24º.- El derecho de propiedad en sus diversas especies sobre toda clase de bienes corporales o incorporales.’

‘24º, The right to property or ownership in all its diverse forms over all class of corporal or incorporeal goods.’

This includes having property rights in tangible and intangible things. Since the enactment of the CPR lawyers have through the *Recurso de Protección* of article 20 and article 19 No 24, taken legal actions based upon the assertion there are rights of property (or ownership) in abstract rights. This means “two rights”: the right itself in any incorporeal goods and then the right of ownership of right. The interpretation of having rights in rights is novel in terms of Roman law notions. For Romans, property was exercised over real things rather than abstractions.

To some this interpretation might have denaturalised paragraph 24 while to others, it means giving constitutional protection not only to rights in objects such as land or moveables but also in cultural and political rights which are abstract things.⁵⁸⁶ Through this constitutional remedy a case of political decolonisation may be built. The Rapanui have a property right in their abstract political right of self-determination.

Finally, the other possible route is more intricate. It would begin with a *demanda civil ordinaria*, which is the appropriate procedure in default of alternative special one. In the hypothetical scenario, after receiving a negative response from the defendant state of Chile, the plaintiff Rapanui side would then lodge a *Recurso de Inaplicabilidad por Inconstitucionalidad* before the TC.⁵⁸⁷ Article 93 number 6 of the CPR and, paragraph 6th of the Constitutional Organic Law No 17.997 regulate this constitutional action.⁵⁸⁸

‘Artículo 93

Son atribuciones del Tribunal Constitucional:

6° Resolver, por la mayoría de sus miembros en ejercicio, la inaplicabilidad de un precepto legal cuya aplicación en cualquier gestión que se siga ante un tribunal ordinario o especial, resulte contraria a la Constitución;’

According to this provision of the CPR, one of the attributions of the TC is to pronounce on the inapplicability of legal precepts whose application if followed before any especial or ordinary tribunal, might result contrary to the constitution. *Ley No 17.997* come to regulate the procedures followed before the TC by means of the *Recurso de Inaplicabilidad por Inconstitucionalidad*.

I imagine that before such legal action (the *demanda civil ordinaria*) the defendant would respond by saying that the Rapanui are not entitled to the right of external self-determination of peoples by reason of the Chilean Constitution, Chilean statutes and history. The state of Chile would probably say that the Rapanui are not a people or a nation entitled to the right of external self-determination but an ethnicity as ruled by the Indigenous Act of 1993. The state of Chile would surely claim that the colonial era finished in 1966 and therefore that the

⁵⁸⁶ I learnt this from one of the most leading professors I had the privilege to hear in the law school of the University of Valparaiso, Chile: the professor of Civil Law Rene Moreno Monroy between the years 1994-1998. Even though his teachings were amazing he never allowed anyone to record his lectures. All my knowledge on this issue of article 19 No 24 and article 20 of the CPR comes solely from my memory.

⁵⁸⁷ This is the mechanism of repressive control of constitutionality I mentioned already when analysing the jurisprudence of the CS and the TC.

⁵⁸⁸ “Ley Orgánica Constitucional del Tribunal Constitucional”, numero 17.997, URL <http://www.leychile.cl/Navegar/?idNorma=29427&idVersion=2009-10-28&idParte>.

ICCPR is not applicable to the case. It would also appeal to the principle of the territorial integrity of states on the basis that the Rapanui people are seen as of the ethnicity of Chile. On the other side, the plaintiff should claim that the Rapanui are entitled to that right by reason of integration of international laws, specially those related to human rights, into the Chilean Constitution and according to the ACHR. It would also affirm that the Advisory Opinion of the Inter-American Court of 1982 and articles 64 and 29 of the ACHR support that and that article 5 of the CPR authorises it. The plaintiff would present the historical facts by placing the time of Chilean colonialism from 1966. This would make the case winnable.

Having here reviewed the feasible municipal routes through which a petition of such nature might be alleged before a Chilean court of law, my position is that there are ways to lodging directly before the IACHR without having to exhaust internal remedies because they are not proper to protect the right alleged (external self-determination). In the other hypothesis (by previous exhaustion of remedies) a case may be built too. To do that, internal remedies should be exhausted previously. After final judgment and notification in Chile, the Rapanui could demand within the period of six months or a reasonable period after the notification of the last instance in Chile. Then a claim could be lodged in the IACHR and so on...

Epilogue

Oceania Mysticism

I got here by flying, eight years ago. (I didn't sail because modern canoes are dark and sad) I dreamt of a bright place in Fiji. I was in the airport albeit asleep. Dreams not real? I was here! But I woke up and I went to Rapanui. I followed the unknown awakening and I bought an ibook g4 (the Mac is dying like the writing of Rodrigo).

I also sailed, but fifteen years ago. (I didn't fly I had no wings) I dreamt amid gloomy present. She left me and I was sad. The professor wanted me to march but I mesmerised his thinking. I demanded of him "ask me what I want to hear" and he said "your wish is my command". I wandered for another seven years until I revived.

The game isn't over, but only developing. Rapanui and international law are today the ethnographical representations of my mystical experience. What else can I do but to follow the brightness and wishes? (Lighting bolts welcomed me in Rapanui as when I arrived in Wellington).

You are a people as amazing as the *Moai*, I said. Yes but we run on petrol to keep going, they replied. Well I can give you Law, if you want. Yes they barked but you are just a dreamer bro! You are right but dreams come true sometimes *taina* (don't you think Hereniko?).

Oceania Broadening

Explorers and missionaries open the jungle (as always the undesirable ones followed). After the burning, the region, if anything, became fertile ground... "of what? Of Pacific Studies my dear". Indeed, ethnographers, anthropologists, legal historians, social scientists, and today lovely economists, political scientists, advisors, developers of strategies, thinkers of how to think, developing studies of how to develop the studies to then develop the people? What the hell is that! ... what about law bro? Law is not here even though it is probably the oldest of disciplines. "Who need lawyers! Only problems they bring! Why bother... Well, excuse me darling but this looks quite messy, doesn't it?"

Exploration, studies, religion, displacement, beliefs, peoples, first peoples, modern mixed-blood diasporas, more exploration and studies, empires, money, power, politics, policies, social policies, health policies, and law?... still awaiting to be called. “Hey! Here I am, ask me, ask me! Mr. Law said”.

Dismissed as futile and troublemaking, Law wants to speak and Oceania needs to listen. “Law is old man! Elders need to be listened and respected. Nobody told you that sweetie? Oh, okay so we do not have time to discuss about the heart or the mind. We do not need a lawyer we need a cardiologist, a neurologist! Oh! So you say it’s too late? Nobody wants to stop in legal nature because is boring and fruitless, isn’t it? You are wrong!

Law as philosophy has the ability to reach the core of meanings, if any. Law, as the closer representation of justice, lies beneath the rest of human sciences. Perhaps, as a modern discipline, Law has the capacity to seek inter-disciplinary solutions when the rest fail in the attempt.

The *Rapañol* rebellion

‘Awareness, no matter how confused it may be, develops from every act of rebellion;’⁵⁸⁹

I was born on the mainland but I was adopted as son of Rapanui... “what can your law say about that? You are not Rapanui *conchatuma’re*! Haha, you are different. Your blood has another colour!! Jaja there is your stupid indigenous law! (They said). And then I retorted, I know that *culia’o no soy tan aweona’o*, just let me wake up again amid your ashes of arrogance and colonialism. I can make fire with your ashes. And then I said softly, come on let us unify the law, one law for all. Let us start with ourselves and the politics will follow.

But I am tired and I proved what I wanted to proved. In football good players know exactly when to assist and retreat. Here I am, leaving, flying back and in an awaking dream. Some changes... well I am still 6 feet tall. Bringing the voice of the noisy silent? Awaken, but just a dreamer.

⁵⁸⁹ *The Rebel. An essay on Man in Revolt* by Albert Camus (1951), translated by Anthony Bower, Vintage International Books, New York, USA, 1991: 14

“They see their *henua* differently Sir! What else young man? Well, heaps of what else Sir! The law is there and plays in their favour. The law has *imperium* by the way. We know that. Okay, well... this case is so special, never seen! It will be in the news and in the 48th edition of Mr. Shaw’s treatises...maybe, but, do you think that your *Rapañol* spirit will have an effect in the souls of *ius soli* fellows? Well, I know politicians are not visionaries because they usually wear horse blinkers and cannot see the horizon. Very likely young man they will stay in their chairs. Yes! but after this their stupefaction will rise up to their roofs of sovereignty rather than simply to their chair postures. Perhaps an ambitious lawyer will come to lodge some petitions. Do you think that another seat can be set-up in the United Nations headquarters in order to restart again the never-ending game? Well, I don’t know sir I am just a dreamer from Oceania.

Appendix 2, Antipoetic fieldwork



What's the point of this? In the end of the day, it's just a bunch of words on a page, and it's not like you're going to be reading it. It's just a bunch of words on a page, and it's not like you're going to be reading it.

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