THE HUMAN RIGHTS OF THE RAPA NUI PEOPLE ON EASTER ISLAND

Rapa Nui



IWGIA report 15

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Observer's Report
visit to Rapa Nui 2011

OBSERVERS:
Clem Chartier, President of Métis National Council, Canada.
Alberto Chirif, Anthropologist and Researcher, IWGIA, Peru.
Nin Tomas, Associate Professor of Law at the University of Auckland in Aotearoa-New Zealand, and researcher in the area of Indigenous Peoples Rights.

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Editor
Observatorio Ciudadano

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OBSERVATORIO CIUDADANO

Antonio Varas 428 - Temuco, Chile
Tel: 56 (45) 213963 - Fax 56 (45) 218353
E-mail: contacto@observatorio.cl - Web: www.observatorio.cl

INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS

Classensgade 11 E, DK 2100 - Copenhagen, Denmark
Tel: (45) 35 27 05 00 - Fax (45) 35 27 05 07
E-mail: iwgia@iwgia.org - Web: www.iwgia.org

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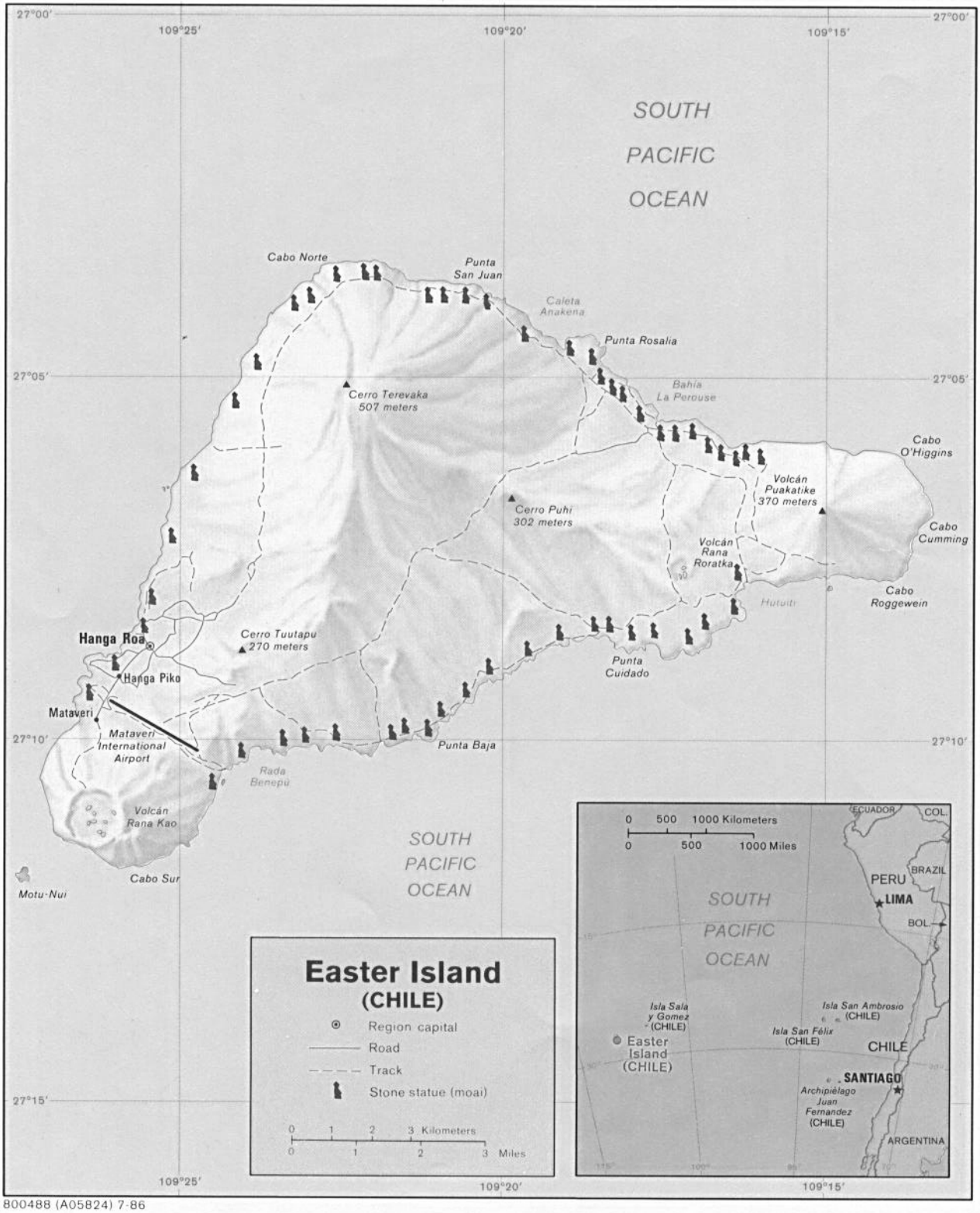
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Map of Easter Island. {{PD-PCL|http://www.lib.utexas.edu/maps/islands_oceans_poles/easterisland.jpg}}

PRESENTATION

This document corresponds to the Report prepared by a group of observers from different latitudes and disciplines, including Clem Chartier, President of the Métis National Council, Canada; Alberto Chirif, Anthropologist and Researcher, IWGIA, Peru; and Nin Tomas, Associate Professor of Law and Researcher in the area of Indigenous Peoples' Rights at the University of Auckland in Aotearoa-New Zealand. For its preparation, the observers visited Easter Island and Santiago, the capital of Chile, in the month of August 2011, where they held meetings with traditional authorities and Rapa Nui organizations, Chilean authorities, Mapuche indigenous organizations and human rights entities.

The purpose of this Report, which has as background the recent events concerning the acts of police violence and criminalization of the territorial claims of the Rapa Nui peoples which occurred in the years 2010 and 2011, is to assess the human rights situation of the Rapa Nui people.

In the first part of the Report, historical information is provided regarding the relationship between the Rapa Nui people and the Chilean State, beginning with the annexation of the Easter Island territory to Chile in the late nineteenth century by signing a Treaty or "Agreement of Wills" in the year 1888 with Rapa Nui authorities of the time. This agreement established the basis of this relationship, becoming an essential tool for determining land rights and self-determination of the Rapa Nui people.

The thesis of the authors is that this agreement is part of a Polynesian tradition of making "international treaties" between peoples in their travels throughout the Pacific Ocean and, in this context, they accepted the Chilean government, but they did not hand over the territory and the investiture of traditional Rapa Nui authorities was maintained. This was violated by the Chilean State, which submitted the Rapa Nui to a series of afflictions, holding them in conditions of semi-slavery, as stateless and denied of all civil and political rights until 1967 when the so-called "Ley Pascua" was enacted, as well as the violation of territorial rights and of self-determination that continue to date.

One of the most serious violations to the rights of the Rapa Nui, which remains to date, is the usurpation of their territory. This was done by means of the registration of the entire Easter Island in the name of the State of Chile, carried out in 1933, a time when the Rapa Nui were considered stateless and lacked all civil and political rights. This registration was conducted in the Valparaiso Recorder of Deeds, a city located on the continent more than 4,000 kilometers from the island, excluding any possibility for opposition, using as an argument that the land had no owners.

Since the enactment of the "Ley Pascua", this relationship changed, recognizing the Rapa Nui's rights of citizenship and other benefits, which was reinforced by subsequent legislation such as the "Indigenous Act" in the early 90's that granted special rights to the Rapa Nui and the ratification of the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries. In practice, however, as explained in this Report, such legislation has not resulted in the return of the land and respect for territorial rights and self-determination of the Rapa Nui peoples.

In the second part of the Report, an updated analysis of the human rights situation of the Rapa Nui people and their demands is made, with particular regard to land rights and self-determination. The background information is presented in more depth with respect to their collective demand to recover their ancestral territory, to respect their right to self-determination under International Law, and for the full recognition of the 1888 Treaty or "Agreement of Wills". The commitments made and not met by the Chilean State to respond to the demands of the Rapa Nui people are also examined. It especially examines the demand for effective political participation and control over their political institutions by way

of establishing a "Special Statute," a method of Immigration Control, and a special reference to efforts to achieve compliance with the right of indigenous peoples to prior consultation.

The Report also analyzes the information about the Rapa Nui people's collective demand to obtain restitution of the territory from which they have been deprived, giving rise to the peaceful occupation of public and private buildings of the island by members of the Rapa Nui people between August 2010 and February 2011. This was used as leverage to demand recognition of their rights to ancestral property, an occupation that was brutally suppressed by the Chilean state, thereby criminalizing social protest in the claim for legitimate rights.

The third section of the Report refers to the overall situation of the Rights of Indigenous Peoples in Chile. This context highlights the lack of constitutional recognition, the absence of a formal mechanism for prior consultation in case of measures which may affect them directly or to ensure their political participation, and the lack of clear measures for the implementation of the ILO Convention 169 in force in Chile since September 2009. This section also includes background information on the lack of legitimacy, indigenous representation, and inefficiency of public state agencies to reflect the social and cultural needs of peoples.

In the fourth part of the Report, it is concluded that the Chilean State maintains inequitable treatment of the Rapa Nui people, does not recognize and respect the 1888 Treaty or Agreement of Wills, thereby breaching internationally recognized human rights for indigenous peoples, particularly the territorial and self-determination rights and the right to political participation. Finally, the fifth section establishes a set of recommendations to the Chilean Government oriented towards the full respect of internationally recognized human rights of the Rapa Nui people.

Finally, the Report includes an annex with a discussion about the principal rights of the American Convention on Human Rights which have been violated by the State of Chile in the case of the Rapa Nui people and its members.

The Report introduced here, constitutes a fundamental document for the knowledge and dissemination of the critical human rights situation of the Rapa Nui people, which must be urgently addressed by the Chilean State based on the international commitments it has assumed in this regard.

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1. HISTORICAL INFORMATION ABOUT THE RELATIONSHIP BETWEEN THE RAPA NUI PEOPLE AND THE CHILEAN STATE

The annexation of Easter Island by the Chilean State was effected by an "Agreement of Wills", on September 9, 1888, a Treaty signed by the navy captain, Policarpo Toro, in representation of the Chilean State and the Rapa Nui king, Atamu Tekena. This document, which was written in Castilian and Rapa Nui/ancient Tahitian, established a relationship between the Chilean State and the Rapa Nui. There are differences between the texts. The Castilian text refers to an absolute transfer of sovereignty by the Rapa Nui to Chile. The Rapa Nui/ ancient Tahitian text, however, speaks of "what is above is written (agreed upon)", indicating that the agreement only refers to use of the surface without transferring title of the land to Chile.[1] Rapa Nui claim that their right of ownership over the entire territory of Rapa Nui was recognized as well as the investiture of its chiefs, with the Chilean Government offering to be "a friend of the island".

Oral traditions transmitted from generation to generation on the Island record that *"Atamu Tekena, the ariki (king), pulled up a bunch of grass with earth in his hand; he separated the grass from the dirt and passed the grass to Policarpo and kept the earth".* [2] This gesture is in accordance with Rapa Nui custom indicating that they kept "*their ownership rights of the land in an inalienable manner*". [3] In 1840, a similar gesture was carried out by the Maori chief, Panakareao, after signing the Waitangi Treaty in Aotearoa, to indicate that "tino rangatiratanga" or absolute chieftainship over lands and territory was retained by the Maori chiefs under the Treaty.

In spite of being separated by an ocean, the similarity of these recorded customs, suggests a common practice may have existed amongst Pacific peoples of demarcating the retention of land and authority in the collective hands of the "tangata henua" (people of the earth), while assigning a lesser authority to foreigners as newcomers. During the Mission, Professor Tomas attended a meeting with members of Te Moana Nui a Kiva, a Pan-Pacific association of indigenous chiefs living within the Polynesian triangle created by Hawaii, Rapa Nui, and Aotearoa. They stated that the process of creating Treaties is not a monopoly of western nations, but was an ancestral tradition frequently engaged in when their ancestors travelled between the Pacific Islands.

Since the annexation of the Island as Chilean territory, the State of Chile has not recognized Rapa Nui authority. Instead it granted the administration of the Island to private individuals and the Chilean Navy. The Report of the National Commission on Historical Truth and Reconciliation states: *"[T]his agreement established the transfer of sovereignty of the Island in favor of the Chilean State, who made the commitment to provide education and development to the Islanders who held their ownership rights over the land, and the Rapa Nui chiefs kept their positions of authority. However, the successive governments failed in their part of this agreement, leasing the entire island to third parties as a sheep farm and registering the ownership of all the land in the name of the Chilean Treasury".* [4]

1 National Commission on Historical Truth and Reconciliation Report, chapter on Rapa Nui people, Page 277. Available at: [http://www.memoriachilena.cl/upload/mi973056855-2.pdf]

2 PEREYRA-UHRLE, Maria, *"Easter Island Land Law"*, in 12 RJP/NZACL YEARBOOK 11, p. 135.

3 PEREYRA-UHRLE, *op. cit*.

4 National Commission on Historical Truth and Reconciliation Report, *op. cit*., p. 276.



Moais in the Rapa Nui National Park, material and cultural heritage of the Rapa Nui people, administered by Corporación Nacional Forestal (CONAF). Photo by Gonzalo Gabarró.

In 1895 the entire island was leased to a Frenchman, Enrique Merlet, and in 1902 to Williamson Balfour, a British company whose subsidiary was the *"Compañía Explotadora de Isla de Pascua"*. From 1917 onwards the Island was subject to the authority, laws, and regulations of the Chilean Navy, which became the only State institution that would stay connected with it and its inhabitants for many years. The National Commission on Historical Truth and Reconciliation records that: *"[D]uring those years, Rapa Nui was governed by the colonizing agents linked to the sheep raising company that economically exploited the Island and by the Chilean Navy, which, for a long time, represented the interests of the Chilean Government. Political control of the sheep farm was exercised by the administration on duty, who at the same time was the Maritime Sub-delegate, standing out for the abuses and mistreatment they committed against the islanders. This resulted in the forced reclusion of the Rapa Nui population to the Hanga Roa zone with no more than 1000 hectares, an area which is fenced off with stonewalls and barbed wire to impede the islanders from moving freely throughout the island countryside. This practice continued until the 1960's and, in fact, was not modified by the naval authorities".*[5]

In direct contravention of the 1888 "Agreement of Wills", on November 11, 1933, the State of Chile registered the ownership of Rapa Nui lands in the name of the Chilean Treasury. Authority for the registration was drawn from Article 590 of the Civil Code, which states that *"All lands which, situated within territorial boundaries, lack another owner are considered State assets"*. The registration was published in a newspaper in the city of Valparaíso. The Rapa Nui were not informed of the registration and could not voice any opposition. Opposition would have been futile anyway because at that time Rapa Nui were not considered to be citizens or nationals of Chile. The registration of ownership was repeated 44 years later in 1967, in the Easter Island Registry of Deeds.

Despite this registration, the books of the Chilean Navy in charge of administering Easter Island since 1917, and the National Property Records, both record transfers of real property

5 National Commission on Historical Truth and Reconciliation Report, *op. cit*., p. 277.

by the Treasury to, and amongst, members of the Rapa Nui. The practice is recorded since 1918 and continues after registration in the name of the Chilean Treasury. It is evidence that the Chilean State did recognize, in a minimalist way, ancestral ownership of the Rapa Nui to their lands.

The civil and political rights of the Rapa Nui were not recognized until 1966. "[T]*he Rapa Nui people were not subject to law. In fact they did not have Chilean nationality and were stateless, a legal status which not only prohibited them from travelling to the continent, except on rare exceptions, but they also could not leave the country since they were not entitled to obtain a passport".*[6]

Years of resistance by the Rapa Nui, together with mounting pressure from various political actors and from within Chilean civil society, and particularly the 1964 rebellion led by Alfonso Rapu, finally led to the enactment of Law Nº 16,441 of 1966 ["Ley Pascua"]. Ley Pascua created a Department in the Easter Island Province and set regulations for the organization and operation of public services on the Island. Rapa Nui rights to citizenship were recognized from that time, together with tax exemptions, land rights, and a process for regularizing land titles and prohibiting land sales to non-Rapa Nui.

In 1979, during the military dictatorship of General Pinochet, Law D.L. 2,885 was enacted to regularize land ownership by granting free property titles to regular landholders. This transfer of land from the Treasury to regular landholders[7] was limited to the Hanga Roa lands on which the Rapa Nui had been relocated after Chile annexed the Island in 1883.

In 1993 democracy was restored in Chile and Law N° 19,253 of 1993, "for Protection, promotion, and development of Indigenous peoples" ["the Indigenous Law"], was enacted. It is still in force. Article 1 recognizes the Rapa Nui as an "ethnic group". It enshrines Rapa Nui rights as an indigenous ethnic group[8] and imposes a State duty to promote those rights. The Indigenous Law also establishes special regulations for the Rapa Nui ethnic group from Article 66 onwards. In particular, Article 67 creates the Easter Island Development Commission ["CODEIPA"], and outlines its function and role in regularizing Island lands. The Indigenous Law refers to the provisions in D.L 2,885 and adopts the same procedural formula and restrictions, but it replaces the old Settlement Commission with a new administrative body, CODEIPA.[9]

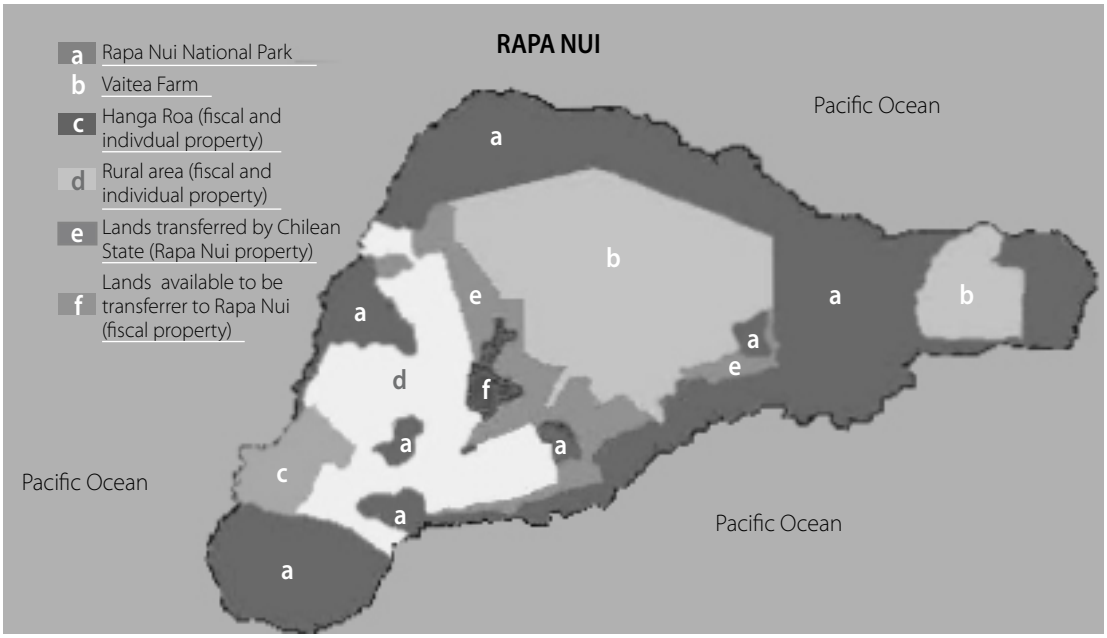
Under CODEIPA, transfers to Rapa Nui have primarily been of small pieces of land granted to individual property owners. The only large transfer of land to Rapa Nui was directed to new families without land, between the years 1998-2000. Under the *"Management, administration*

6 National Commission on Historical Truth and Reconciliation Report, *op. cit*., p. 277.

7 That which comes from fair title and was acquired in good faith

8 Law N° 19.253 uses the term "ethnic groups."

9 *Article 67.-*
The Easter Island Development Commission is hereby constituted having the following attributions:
1.- To propose to the President of the Republic the destinations contemplated in articles 3 and 4 of the Decree Law N° 2,885, 1979;
2.- To comply with the functions and attributions that Decree Law N° 2,885, of 1979, provides to the Settlement Commission. In the compliance with these functions and attributions, it must consider the requirements established in Title I of the aforementioned Decree Law and, in addition, the following criteria:
a) To analyze the need for land of the Rapa Nui or Easter Island population.
b) To evaluate the contribution that said lands make to the development of Easter Island and to the Rapa Nui or Easter Island community.
c) To foment the cultural and archeological wealth of Easter Island;
3.- To formulate and execute development programs, projects, and plans tending to elevate the standard of living of the Rapa Nui or Easter Island community, conserve its culture, preserve and improve the environment and the natural resources existing on Easter Island;
4.- To collaborate with the National Forestry Corporation (CONAF) in the administration of the Easter Island National Park;
5.- To collaborate in the conservation and restoration of the archeological patrimony and of the Rapa Nui or Easter Island culture , together with Universities and the National Monuments Council, and
6. - to prepare covenants with persons and national and foreign institutions for the compliance with the aforementioned objectives.



Map produced by Rubén Sánchez, Observatorio Ciudadano, based on information of the Ministerio de Bienes Nacionales Chile

and provision of fiscal property on Easter Island" program, 1,500 ha (254 ha of National Park, 755 ha of the Vaitea Farm and 500 ha of Fiscal property)[10] was transferred. However, only the first stage of this program has been completed, and only 13% of Island land is currently under Rapa Nui control, while more than 70% remains government property[11]. Government property is held in two entities. The first is the Vaitea Farm, which is administered by the private Company, *Sociedad Agrícola y Servicios Isla de Pascua Limitada* ["SASIPA"], whose main objective is the administration and exploitation of agricultural and urban property, public utilities services and other assets, such as the electricity and drinking water services, located on Rapa Nui. The second is the Rapa Nui National Park, which is managed by the *National Forestry Corporation* ["CONAF"], a private corporation whose main purpose is to foster the conservation, growth management, and utilization of forest resources and protected areas in the country.

The *National Indigenous Development Corporation* ["CONADI"] is a public service body created under the Indigenous Law. Its functions include the restoration of ancestral lands that have been taken away from indigenous peoples. It has been interpreted by CONADI that it does not have legal mandate for regularizing the land as this authority belongs to CODEIPA and to the Ministry of National Asset. As a result, the Land and Water Fund established under Article 20[12] of the Indigenous Law has been executed restrictively on the Island for irrigation infrastructure only.

10 See: *"Los Derechos de los Pueblos Indígenas en Chile"*, Indigenous Rights Program Report, Institute of Indigenous Studies, Universidad de la Frontera, Lom editions, 2003. Chapter V, *"Los derechos del pueblo Rapa Nui"*

11 See: RIVAS, Antonia, *"The Power of the Law. Land Rights on Rapa Nui"*, p. 18-19, Paper delivered to the Law and Society Association conference. San Francisco, June 2011.

12 The Fund for Indigenous Lands and Water is a mechanism created by the Indigenous Law to subsidize the expansion of indigenous lands, through purchasing land from private owners which are claimed by indigenous peoples and constitute or regularize the water rights to indigenous peoples.

2. DIAGNOSIS OF THE HUMAN RIGHTS SITUATION OF THE RAPA NUI AND THEIR DEMANDS, WITH SPECIAL REFERENCE TO THE RIGHTS OF SELF-DETERMINATION AND TERRITORIAL RIGHTS.

Conversations with Rapa Nui government authorities and the general public established a widely-held view that the entire Rapa Nui territory is claimed as ancestral territory held collectively by the different clans under their customs and laws.

Today approximately 3,000 Rapa Nui live on the Island.[13] Those we interviewed said that their current land and territorial claims under "self-determination" and "land rights" are based on original occupation and ancestral rights to the land that existed prior to the 1888 Treaty. Some questioned its validity, noting that the current exercise of government over the island by the Chilean State does not recognize this perspective, but relies instead upon the Spanish language version of the 1888 Treaty, under which Chile claims to have acquired "sovereignty" over the territory and inhabitants of Rapa Nui under outmoded colonial concepts of international law that have long been discredited.

There is growing concern amongst the Rapa Nui that the State of Chile does not recognize or promote "self-determination" according to the precepts of modern International Law, but continues instead to rule Rapa Nui without recognizing either the autonomy or self-government and territorial rights of the Rapa Nui people.

Discontent amongst the Rapa Nui has its legal origin in the non-ratification of the Agreement of Wills Treaty by the Chilean Government and non-compliance with its terms. As previously mentioned, the entire island was registered as the property of the State of Chile in 1933, without respecting the 1888 Treaty, the Rapa Nui people, or their kinship and ruling systems.

In this regard, Chilean government authorities spoke about recent efforts made to provide for representation of Rapa Nui in government, to consult with indigenous peoples in Chile (including the Rapa Nui), and to resolve land rights and provide access to public services on the island. The effectiveness of these government measures was questioned by the Rapa Nui and Mapuche representatives with whom we met in Santiago.

In general, such measures were viewed as unsystematic and piecemeal steps taken to resolve problems posed by migration, the poor political relationship that exists between Rapa Nui and the Chilean Government, and individual land claims. No-one we interviewed saw them as a genuine effort toward implementing the 1888 Treaty. A widely-held view was that true recognition must include forms of Rapa Nui self-government and autonomy.

An elder of the Rapa Nui Parliament told us that the right to prior consultation and consent that is stipulated in ILO Convention 169 of the ILO makes sense to them, but that State actions have not been consistent with this. In his opinion, the Government has not consulted them about the activities that it develops on the island. The Rapa Nui Parliament wanted to know the laws and rights that they can make use of to protect their natural resources, including their ocean fisheries.

Likewise, Parliament members also cited historical conflicts and disputes with the

13 The latest official statistic corresponds to the Population Census carried out in 2002, a time in which the Island had 3.798 inhabitants, of whom 2.269 were Rapa Nui. www.ine.cl

Chilean State over land. They want the State to recognize that the land belongs to the Rapa Nui people and to initiate a process for regaining the effective control of island lands to them.

2.1. Self Determination

Self-determination is a principle of International Law that has been transformed and reshaped over the years, from an aspirational principle for States that is enshrined in the United Nations Charter of 1945, to an enforceable right of colonized peoples at the time of decolonization from 1945 to the 1960's, to a recognized right of peoples living within States under the Civil and Political Rights and Economic and Social Rights Covenants of the United Nations by the late 1960's, and, finally, as a right of indigenous peoples that must be respected by the States under the 2007 UN Declaration on the Rights of Indigenous Peoples.[14]

This principle of International Human Rights Law is based on Article 73 of the United Nations Charter [15] which states: *"The Members of the United Nations which have or assume the responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the wellbeing of the inhabitants of these territories"*, and, to this end, they are committed to comply with certain obligations, amongst which, the first two are especially relevant to the case of the Rapa Nui:

a. *"to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;*

b. *"to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement".*

In practice, the right could only be exercised by peoples inhabiting overseas colonial territories, and it thus avoided the problems of internal colonialism and indigenous peoples. The theory, referred to as the "the blue water thesis" has its legal foundation in Principles IV and V of the Resolution 1541 of United Nations.[16]

Although the Rapa Nui case was not considered for the Decolonization Program by the United Nations, it meets all of the requirements of the "sea in between" theory, a situation further enhanced by the fact that it involves an indigenous people.

The recognition of this principle of International Law as an enforceable right of indigenous peoples is possible because the principle has evolved to the point where it now has the status of a collective Human Right. In this way, as indicated by Anaya, *"self-determination is properly interpreted as arising from the framework*

14 See: TOMAS, Nin, *"Indigenous Peoples and the Maori. The Right to Self-Determination in International Law-From Woe to Go"*, in New Zealand Law Review, 2008, p. 648.

15 Alberto Chirif is grateful for the information and reflections that were provided on this matter by Pedro García Hierro.

16 Principle IV: *Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V: Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

of human rights of contemporary international law more than from the framework of the rights of the States". [17]

Indigenous peoples were historically, deliberately excluded from the right to self-determination, despite its recognition as a collective human right in the United Nations Covenants that ensure this right to all "peoples".[18]

Common Article 1 of the Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights states:

"Article 1

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

2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*

3. *The States, parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations".*

After years of claiming this right in international organizations, indigenous peoples finally gained recognition in the 2007 United Nations Declaration on Rights of Indigenous Peoples. Special measures are established in the Declaration to ensure indigenous autonomy and self-government in internal and local affairs[19], as well as the right to determine and develop priorities under the right to development.[20]

In this way, indigenous peoples have the right to maintain and develop their political, economic, and social systems and institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. The right of Indigenous Peoples to determine and develop all health, housing, and other economic and social programs that affect them, and, wherever possible, to administrate these programs through their own institutions, is specifically recognized.[21]

It is important to note that ILO Convention 169 has been in force in Chile since September 2009. Because States feared that self-determination under the United Nations Covenants might support secession, Article 1.3 of the Convention states that the term "peoples" *"shall not be construed as having any implications as regards the rights which may attach to the term under international law".* This limitation does not exclude indigenous peoples from the human right of self-determination.

In this regard, the ILO itself declared that ruling on the self-determination of indigenous peoples was outside the scope of its competence.[22]

Even though the ILO Convention and the Declaration bear a different legal status, the Declaration is considered to be binding by

17 ANAYA, James, "*The right of indigenous peoples to self-determination*", in "*The challenge of the Declaration – History and Future of the United Nations Declaration on Indigenous Peoples*", editors Claire Chambers and Rodolfo Stavenhagen, IWGIA, 2009.

18 See TOMAS *op. cit.* and ANAYA, *op. cit.*

19 *"Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."* (Article 4)

20 *"Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development."* (Article 23)

21 Articles 20 and 21, United Nations Declaration on the Rights of Indigenous Peoples.

22 International Labor Conference; *Partial revision of the Covenant on Indigenous and Tribal populations, 1957 (N° 107) Report IV (2ª),* International Labor Office, Geneva, 1989.

indigenous peoples, upon the States that willingly signed it after 25 years negotiating its terms. Articles 38 and 42 of the Declaration set out the duties of compliance and promotion required of States:

> *"Article 38: States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."*
>
> *"Article 42: The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration".*

Furthermore, States must view it as an instrument that enlightens public policy and guides the interpretation of legislation. In Chile, this includes ILO Convention 169. The instruments should not be read as conflicting; on the contrary, they are to be viewed as containing complementary norms that must be interpreted harmoniously.

The Declaration raises the profile of ILO Convention 169. Article 35 of the Declaration states that *"*[T]*he application of the provisions of this Convention* ***shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, customs, or agreements".***[23]* CLAVERO argues that, *"…the Convention can be a very valuable tool for the actual reception of the UNDRIP in the case of States that are party to it, or which will take part in it the future".* [24]

Although the Convention does not expressly recognize indigenous peoples' right to self-determination, it supports human rights by acknowledging that indigenous peoples have the right to decide their own development priorities affecting their lives, beliefs, institutions, and spiritual well-being, the lands they occupy and use, and to control their own economic, social and cultural development.

The ILO has strongly argued that its provisions do not support creating a State within a State but are oriented toward actions *"in the framework of the State in which they (the indigenous and tribal peoples) live".* [25]

In line with the above, the Convention urges governments to promote indigenous self-development. It suggests that States, upon the request of the peoples concerned, provide appropriate technical and financial assistance wherever possible, for the management of their own funds, taking into account the traditional technologies and cultural characteristics of the peoples, as well as the importance of sustainable and equitable development.[26]

The right to self-determination for indigenous peoples has been reinforced by the jurisprudence of the United Nations Human Rights Committee in two cases decided under Articles 1 and 27 of the Covenant on Civil and Political Rights, in 1984 and 1994.

The Committee stated in its General Observation N° 12, of 1984, under Article 1 of the Covenant on Civil and Political Rights, which contains the right to self-determination of peoples, that:

> ***"6.*** *Paragraph 3, in the Committee's opinion, has special importance in that* ***it proposes specific obligations to the States*** *parties to the covenant, not only in relation to their own peoples but* ***with all peoples*** *who have not been able to exercise their right to self-determination or who have been deprived of the possibility of exercising said right. The* ***general character of this paragraph*** *is confirmed by the information*

23 The highlighting is ours.

24 CLAVERO, Bartolomé, *Cometido del Foro Permanente para las Cuestiones Indígenas a la Luz del Valor Vinculante y con Vistas a la Mayor Eficacia del Derecho Internacional de los Derechos Humanos*, United Nations , PFII/2009/EGM1/4.

25 ILO Guide, p. 20 and 21.

26 Article 23.2 of the ILO Convention 169.

relating to its writing. Said paragraph stipulates that: "The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". These obligations exist irrespective of whether a people entitled to self-determination depends, or not, on a State party to the Covenant. It follows that all States parties should adopt positive measures to facilitate the exercise and the respect of the rights of peoples to self-determination.

These positive measures should be compatible with the obligations contracted by the States pursuant to the United Nations Charter and international law; particularly the States must refrain from interfering in the internal affairs of other States, thereby unfavorably affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures adopted to that effect". [27, 28]

In addition to ensuring the autonomy and self-government of indigenous peoples in their internal and local affairs, and in accordance with their own political institutions and cultural models, the right to self-determination also has a participative aspect[29] that requires that indigenous peoples be able to participate fully *"*[i]*n the political, economic, social and cultural life of the State"*, [30] and in all decisions affecting them.[31]

The right of consultation of indigenous peoples is clearly established in Article 19 of the Declaration: "[T]*he States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them"*.

The right of participation has been widely recognized by international human rights law. Instruments such as ILO Convention 169 provide recognition in Articles 6 and 7. However, it is also viewed as an extension of the human right to political participation in courts such as the Inter-American Court of Human Rights ["IACHR"]. The IACHR has stated that: "[T]*he right to consultation, and the corresponding state duty, are linked to several human rights, and in particular they connect to the right of participation established in Article 23 of the American Convention, as interpreted by the Inter-American Court in the case of YATAMA vs. Nicaragua. Article 23 recognizes the right of '[e]very citizen' to 'take part in the conduct of public affairs, directly or through freely chosen representatives'. In the context of indigenous peoples, the right to political participation includes the right to 'participate in decision-making on matters and policies that affect or could affect their rights from within their own institutions and according to their values, practices, customs, and forms of organization*". [32]

Taking account of the above, and given that Chile has signed the United Nations Covenant

27 General Observation No. 12, General comments made by the Human Rights Committee Article 1 – Right to Self-determination, 21st period of meetings, U.N. Doc. HRI/GEN/1/Rev.7 at 152 (1984).

28 The highlighting is ours.

29 ANAYA, *op cit*.

30 Article 5, United Nations Declaration on the Rights of Indigenous Peoples.

31 Article 18, United Nations Declaration on the Rights of Indigenous Peoples.

32 Inter-American Commission on Human Rights, Report: *"Rights of Indigenous and Tribal Peoples over their Ancestral Lands and Natural Resources"*, December 2009, p. 109, parag.274.

on Human Rights[33], ILO Convention 169[34], and the United Nations Declaration on Rights of Indigenous Peoples[35], we conclude that the State has not complied with the right of self-determination as it applies to the Rapa Nui.

In conversations with the Rapa Nui we discerned that most Rapa Nui want Chile to continue its relationship with the island. They are not seeking secession, but want their relationship with the Chilean State to be re-framed under laws and institutions that reflect greater respect for the Rapa Nui and which adhere to modern international law guidelines, including the Declaration on the Rights of Indigenous Peoples.

We have witnessed the unsuccessful attempts of the Rapa Nui people to gain recognition of their right to self-government, through their own institutions and according to development priorities defined by them, under the *"Special Statute"* passed by the Chilean government for Rapa Nui. Commitments made by the Chilean government under this statute have only been partially implemented, requests for migration control are now urgent, and Consultation processes need to be reviewed.

In July 2007, law reform introduced a new norm into Chapter XIV of the Chilean Constitution on Government and Internal Administration of the State. It provided:

"Article 126 bis. - The Special territories correspond to ***Easter Island*** *and to the Juan Fernández Archipelago. The Government and Administration of these territories shall be governed by the* ***special statutes established by the respective constitutional organic laws".*** [36]

Constitutional reform is necessary because the current State administration does not meet the demands and needs of the Rapa Nui.

The Republic of Chile is divided into territorial "Regions" that are administered by "Regional Governments". They are comprised of the "Intendant", who is directly appointed by the President of the Republic, and the Regional Council. The Council is presided over by the Intendant. Council members are appointed by municipal councilors, authorities of the local municipal governments who are publicly elected.

The Regions are constituted by smaller territorial units called "Provinces". Each Province is administered by a Governor chosen by the President. The Governor operates under the authority of the Regional Intendant. He supervises existing public services within the

33 Ratified and in force since 1976. It is worth noting that the Human Rights Committee, in the Observations made to the State of Chile in its Fifth Periodic Report, CCPR/C/CHL/CO/5, 89th period of sessions, April 17, 2007, made a recommendation regarding Indigenous peoples (especially Mapuche people), based on Articles 1 and 27 of the CCPR, establishing the following in paragraph 19 of said Report:

"While noting the intention expressed by the State party to give constitutional recognition to indigenous peoples, the Committee is concerned about the variety of reports consistently received in the sense that some of the claims of indigenous peoples, especially the Mapuche people, have not been met, and the slow pace of demarcation of indigenous lands has caused social tensions. The Committee is sorry to learn that "ancestral lands" are still threatened by forestry expansion and energy infrastructure megaprojects. (Articles 1 and 27)

The State party should:

a) Make every effort to ensure that its negotiations with indigenous communities indeed lead to a solution that respects the land rights of these communities in accordance with Articles 1 (paragraph 2) and 27 of the Covenant. The State party should expedite procedures to recognize such ancestral lands.

b) Modify Law 18,314, adjusting it to Article 27 of the Covenant and reviewing sectorial legislation that may be in conflict with the rights enshrined in the Covenant.

c) Consult with indigenous communities before granting permits for economic exploitation of disputed lands and ensure that the exploitation in question does not violate the rights recognized in the Covenant."

34 Ratified and in force since 2009.

35 Signed by Chile with a favorable vote to its adoption at the General Assembly of the United Nations in September 2007, without reservations.

36 The highlighting is ours.

Province, according to instructions given by the Intendant. [37]

Rapa Nui belongs to the territorial Region of Valparaíso. Its Regional Government and Intendant reside in the regional capital city of Valparaíso which is 4,000 km from Rapa Nui. At the same time, Rapa Nui also constitutes the Province of Easter Island and the Municipality of Easter Island, whose respective authorities are the Provincial Governor, under the central administration; the Mayor, and the Municipal Council, these last being elected by popular vote.

In addition, CODEIPA is a legal body created by Law 19,253 of 1993, for the fulfillment of specific functions set out in Article 67. It has 15 members and is chaired by the Governor. There is no guarantee of a Rapa Nui majority in CODEIPA as only 6 of its 15 members are directly elected by the Rapa Nui. [38]

The overlapping authorities set out above, the constant demand from the Rapa Nui for effective political participation and control over their political institutions, and the geographical isolation and archeological and natural heritage of the Island, have together led to approval for constitutional reform to establish a "Special Statute" for Rapa Nui.

A Presidential Message announcing the constitutional reform process was submitted to Congress in 2005. It stated that:

> "[T]*he Rapa Nui territory management is particularly complex due to, among other factors, its natural and archeological heritage, unique to this planet, to its geographical isolation as an island, and by being mostly inhabited by members of an ethnic community that seeks greater opportunities for participation.*
>
> *The administration of the territory is structured by a series of political tensions in a broad sense of the term (between Rapa Nui authorities and heads of services, Rapa Nui leaders and national authorities) and, certainly, by the plurality of laws that affect the management of the island".*[39]

In compliance with the constitutional reform that introduced Article 126 bis, a Bill was submitted to the Congress of Chile in July 2008, by Presidential Message, on the *Special Statute of Government and Administration for the Easter Island Territory*. The Bill has been stalled, without discussion, in the first constitutional stage in the House of Representatives, since December 2010 (Legislative Bulletin N° 5940-06). [40]

The Bill refers to the special situation of Easter Island due to its territorial isolation. It does not recognize rights to self-government of the Rapa Nui and it guarantees them little participation in the public positions and bodies that are created for the administration of the territory.

In short, the Bill re-organizes the authorities that are already administering the Island, using a model similar to the rest of the territory. It turns Rapa Nui into a territorial unit similar to a "Region",

37 Article 4, of Law N° 19,175, Constitutional Organic Law on Government and Regional Administration.

38 *"Article 68. - The Development Committee of Easter Island will consist of one representative from the Ministries of Planning and Cooperation, Education, National Assets and National Defense; a representative of the Production Development Corporation (CORFO), one of the National Forestry Corporation (CONAF), and one from the National Indigenous Development Corporation (CONADI); the Governor of Easter Island; the Mayor of Easter Island, and six members of the Rapa Nui or Easter Island community elected pursuant to regulations issued for this purpose, one of the whom shall be the President of the Council of Elders. The Governor shall chair this Committee and the Head of the Bureau of Indian Affairs of Easter Island will act as Technical Secretary. "*

39 History of the Law Nº 20,193 Constitutional reform project that establishes the special territories of Easter Island and the Juan Fernández Archipelago, National Congress Library, July 30, 2007. Available at: [http://www.leychile.cl/Navegar?idNorma=263040

40 Legislative Bulletin N°5940-06. Available at: http://www.camara.cl/pley/pley_detalle.aspx?prmID=6325&prmBL=5940-06]

which will be administratively dependant on the central government. It does not create more opportunities for the Rapa Nui to participate in decision-making.

According to the government proposal, the highest authority in the Special Territory would be the "Island Governor", who would head an "Island Territory Government" appointed by the President. The Island Governor would exercise his/her functions according to Presidential instructions, in a role that would include presiding over the "Island Development Council" and the "Land Commission".

The Government of the Island Territory will be by a new legal body similar to the regional councils named in the "Island Development Council". The Council is described as a political body that is representative of the community. It is made up by 6 councilors who are elected directly by citizens registered in the electoral registry of the Special Territory, at least 4 of whom must be Rapa Nui; the President of the Rapa Nui Elders Council; the Rapa Nui Mayor and the Island Governor. The Governor will be the chairman and will have speaking rights only. The limitations of this body are clear: its main powers are to oversee and approve distribution of the island investment program proposed by the Island Governor.

CODEIPA would be replaced by a "Land Commission" established to regularize Rapa Nui property ownership. The Commission would comprise the Island Governor, who would preside; 5 Rapa Nui members; the President of the Elders Council; the Mayor of Easter Island; 1 representative of the Ministry of National Assets; and the Director of the CONADI office on Easter Island. However, no new powers are contemplated to reverse the shortage of lands held by the Rapa Nui, and, even more worrisome, the collaboration that CODEIPA grants to CONAF in the administration of the National Park would come to an end. This would end what little participation Rapa Nui currently have in the administration of this protected area, which is the primary patrimony of the Rapa Nui.

Inconsistency in the contents of the Bill and lack of consultation with the Rapa Nui about legislative measures that directly affect them, has produced resistance from the Rapa Nui. Although withdrawal of the Bill was agreed by the executive in December 2010, it has not yet taken place. This has resulted in a clear discontent by the Rapa Nui of the Chilean government who are seen as makers of false promises.

During our mission and particularly during the Seminar on *"The Human Rights of Indigenous Peoples and their implications for the Rapa Nui People",* held in Hanga Roa on August 1- 2, 2011, we witnessed an overwhelming rejection of the *Special Statute* Bill by the diverse organizations that represent the Rapa Nui**.** A high level of distrust in what the government is doing on the other side of the ocean in Chile was evident. It was apparent to us that the current government is not well viewed on the island.

2.1.1. Right to Consultation over Migration Control.

Another historical demand of the Rapa Nui is for controlled migration to Rapa Nui. Generalized noncompliance and lack of implementation by the Chilean government of the right to consultation of indigenous peoples is evident in the legislative process established for migration control to Easter Island.

After the introduction of the new Article 126 bis of the Constitution, a constitutional amendment was submitted to permit migration control in the territories of the Juan Fernández archipelago and Rapa Nui. [41]

The Rapa Nui demand for migration control is based on concern to preserve their culture and territory, a fragile ecosystem that will suffer irreversible environmental damage if the island's demographic carrying capacity is not regulated.

41 Submitted to Congress by means of Presidential Message N°1487-357, dated October 28, 2009 (Legislative Bulletin N° 6756-07).

We echo this concern about the risk to the cultural integrity of the Rapa Nui posed by exceeding the population carrying capacity of Rapa Nui.

We view with concern the information and projections of the National Institute of Statistics (INE) that state that in 1992 Rapa Nui had 2,973 inhabitants, in 2002 it had 3,978 inhabitants and in 2012 its population has reached 5,167. The Rapa Nui population has increased by 86% in 20 years, a period in which the overall national population of Chile has increased by only 63%.[42]

The cultural and environmental impacts generated on Rapa Nui as a consequence of the population growth due to external migration, is why the Rapa Nui, through their organizations, demanded the establishment of migratory control over their territory. The authority proposes modifying the Constitution of the Republic, Article 126 bis, by adding a second paragraph to authorize migratory control and restrict the free movement of people to the island territory. The executive, mindful of ILO Convention 169, carried out a consultation process in order to collect the views of the Rapa Nui prior to submitting the reform Bill to Congress.

The consultation process was criticized for not complying with international standards that require intercultural dialogue, but instead being treated as an *information gathering* exercise. Despite criticism it was validated by Rapa Nui organizations. The project was submitted to the vote of the Rapa Nui by a plebiscite held on October 24, 2009, in which more than 700 persons participated. The text was approved by over 96% of those who voted. The plebiscite contained the following: *"Do you agree for the Constitution to be amended in order to restrict the exercise of free circulation, permanence or residence, for the purpose of protecting the environment and the sustainable development of the Island?".*

It should be noted that the Rapa Nui, despite their approval, questioned the content of the project because it did not expressly exclude them from migration control or protect their free circulation on their ancestral lands. In addition, concern was expressed that it did not take into consideration the right to conserve their culture and self-determination as justifying the Rapa Nui reason for controlling migration.

The Bill was submitted by Presidential Message to the Congress for its approval and passed its first constitutional step before the Senate. However, while it was in the House of Representatives, the President of the Republic, making use of his constitutional powers, without reference to other reasons or without consulting the Rapa Nui people, substantially modified the text of the Bill that was submitted to vote.[43] The new text reads as follows:

> *"Article One.- To be incorporated into Article 126 bis of the Constitution of the Republic, the following new second paragraph:*
>
> *"The Rights to reside, stay and transfer to and from any place in the Republic, guaranteed in number 7° of Article 19, shall apply in said territories in the manner determined by the special laws that regulate their exercise, which must be of qualified quorum".*

The Bill no longer restricts the right of freedom of movement, but simply regulates its exercise. It eliminates references to environmental protection and sustainable development on Rapa Nui that were contained in the original Bill, as recorded in the report prepared by the House of Representative's Committee on Constitution, Legislation and Justice dated November 02 of 2010. Page 1 of that Report states:

42 Report submitted by the Government Commission, Decentralization and Regionalization of the Senate, dated December 17, 2009, the Bill amending Article 126 bis of the Constitution of the Republic, on special territories of Easter Island and Juan Fernández Archipelago .

43 Official Letter N° 171-359 dated September 06, 2011.

> *"I.- CENTRAL OR FUNDAMENTAL IDEAS.*
>
> *The central idea of the initiative is to amend Article 126 bis of the Constitution, to allow to legally establish on the island territories of Easter Island and Juan Fernández,* ***restrictions*** *to the rights of permanence or residence and to the free circulation to them, for the purpose of* ***protecting the environment and ensuring their sustainable development".*** [44]

The amendment, which was approved by the Congress of Chile in January 2012, seriously violates the will of the Rapa Nui people as expressed by popular vote, and the right of indigenous peoples to be consulted on legislative measures that affect them. It is our view that the right to consultation also includes any modification of essential matters agreed upon in previously consulted projects. There is an urgent need for the Chilean legislature to determine how it will fulfill its duty to consult properly with indigenous peoples.

2.1.2 Conclusion

It is our Opinion that the demand for self-determination by Rapa Nui is oriented towards exercising greater autonomy in the form of self-government, under the terms established by the UN Declaration on the Rights of Indigenous Peoples. To make this demand a reality, an internal discussion is required amongst the Rapa Nui, along with an intercultural discussion between the Rapa Nui and the State of Chile. Discussions must be carried out in the utmost good faith. We suggest that it would be beneficial to keep in mind the unique characteristics of the Rapa Nui and to look at comparable systems from other Pacific nations that share a common history with the Rapa Nui in order to forge the best way forward.

Of particular importance in this regard are the observations made by the anthropologist, Alberto Chirif, who states that when talking with the Rapa Nui he perceived a strong sense of identity and, in fact, that concrete manifestations of this can be found. The widespread use of the language is one of the most compelling demonstrations of their identity that a visitor can experience. At the same time, in conversations with the people it is clear that they know their own history, both ancestral with other parts of the Pacific and more recently with Chile as a colonial power.

Professor Tomas, a Maori legal researcher knowledgeable about Pacific peoples, stated that the Rapa Nui people and territory possess unique characteristics that will influence the way that self-determination is assumed. She observed that Rapa Nui cultural links and identification with Pacific peoples is stronger than with fellow Chileans. In particular, it was obvious that:

- Rapa Nui language, culture and physical appearance have strong Tahitian and Maori associations.
- The friendly and inclusive "collective" community style that governs personal interactions amongst the Rapa Nui are characteristic of Polynesian society. This differs considerably from the rugged individualism found within Western society.
- The Rapa Nui language contained many words used by the Maori of Aotearoa, New Zealand. For example: "pono" truth; "tana ingoa" his or her name; "henua" land/territory; "tangata henua" people of the earth; "mana" authority/prestige; "tapu" sacred/restricted.

Professor Tomas also observed that Rapa Nui culture is based upon a deep bond that connects the "wairua" (spirit) of the land (henua) with the spirit of the people (tangata). This is also typical of the relationship of the Maori and other Polynesian peoples with their world, and their ancestors (tupuna), and is expressed in the genealogy of their families (hakapapa).

The Maori of Aotearoa and the inhabitants of Rapa Nui share common ancestors. Professor

44 The highlighting is ours.

Tomas was greeted as a "teina" (sister) coming home by the Rapa Nui. In the evening of the second day she was received by a Rapa Nui women's organization, Makenu Re'o Rapa Nui, with the traditional "karanga" (formal welcome through song), followed by prayer, rituals, and the blessing of food, which were familiar to her as they corresponded to common practices in the customs of the Maori in Aotearoa. As a first-time visitor, she was able to communicate in a language that was mutually understandable. "It was like being welcomed home", she said.

Although Rapa Nui is not explicitly named in the list of territories permitted to achieve total independence by adopting the legal "blue water" thesis promoted by the United Nations in the 1950's and 60's, it satisfies the founding criteria of being a culturally and physically distinct nation that is separated from Chile by 4000 kilometers of ocean.

However, any aspiration to pursue full independence from Chile is mitigated by the small size of the island, the scarcity of natural resources, and its isolation. In similar situations, and by way of comparison, certain other Pacific Islands, such as Tokelau, Niue, and the Cook Islands, which had the opportunity to assume the status of fully independent territories under the scheme promoted by the United Nations, chose to enter into Free Association with Aotearoa, New Zealand instead.

We reiterate that most Rapa Nui did not seek full independence from the Chilean State, but rather desired forms of self-government that gave them greater control of their lands and affairs.

2.2. Territorial Rights

2.2.1 Lands Occupations

As indicated above, the Rapa Nui people have been deprived of a large part of their ancestral territory. Most of it is now held by the Chilean Treasury. In August 2010, members of the Rapa Nui carried out peaceful occupations of public and private buildings in Hanga Roa, as a way of bringing pressure to bear on recognizing their ancestral property rights to the lands on which these buildings were located, and to the rest of the island which currently has the status of fiscal property of Chile.

These occupations principally included:

a. Private property - the Hotel Hanga Roa land that was transferred by the State to private entities without the consent of the Hito Clan.

b. Civic Center - 6 fiscal properties occupied by the Tuko Tuki Clan.

c. Riro Kainga Plaza occupied by the Rapa Nui Parliament and clan members.

According to information gathered during the mission, the government reacted to the situation by initiating a process of dialogue with discussion groups, by sector. However, at the same time, it also criminalized the actions of protesters and increased the police presence on Rapa Nui. The increased police presence created an unprecedented climate of militarization on Rapa Nui. The issuing and carrying out of administrative and legal eviction orders in a violent and harassing manner further exacerbated the situation.

On August 06, 2010, the Minister of Internal Affairs, Rodrigo Hinzpeter, undertook to establish work committees that would address the demands of the Rapa Nui within 60 days. This included demands for land (including the occupied lands), migration problems, the Statute for Rapa Nui Autonomy and the preparation of a Development Plan for the Island.

The following work committees were created:

- "Migration", headed by the Deputy Minister of Internal Affairs, Rodrigo Ubilla;

- "Administrative Statute", headed by the under-secretary of Regional Development, Miguel Flores;

- "Development Plan", headed by the Intendant of Valparaíso, Raúl Celis; and



A Carabineros de Chile contingent prepared for the eviction of the Hitorangui clan from the Hanga Roa Hotel, on February 2 of 2011. The eviction was implemented without previous judicial order two days prior to the judicial hearing where the formalization of the clan members took place. Isabel Burr, Sacrofilms files.

- "Land", headed by the Deputy Minister of National Assets, Carlos Llancaqueo (current presidential commissioner for Easter Island).

The dialogue opened up by the Chilean government through work committees to resolve the disputes was conditional on protestors leaving claimed lands. This requirement guaranteed limited Rapa Nui participation from the outset. It was also claimed that the committees lacked transparency, that no minutes were kept, and no official documents were issued by the committees. The committees were viewed with skepticism by many Rapa Nui and their organizations, to the extent that some withdrew their claims from the process. Thus, for example, the Hito Clan, who claimed lands on which the Hotel Hanga Roa is currently located, did not present its records and information to the "Land" work committee.

On October 22, 2010, after the 60 days in which the government promised to deliver the results of the work committees had elapsed, the Minister of Internal Affairs announced the "Easter Island Development Plan". The Plan was criticized by the Rapa Nui because it involved projects and resources that had already been committed to by the previous administration, as for example resources already allocated for the Hanga Roa Hospital. It was also criticized for not complying with promises made for a migration statute by December 2010, something which has still not been agreed with the Rapa Nui.

In late December 2010 the Government provided a private summary of the work committees to members of the CODEIPA and to the authorities of Easter Island, but the information was not made publically available to the Rapa Nui. The document was described by the government as a *"diagnosis of the situation based on which Government proposals shall be made"*. It does not contain solutions that have been agreed upon with the Rapa Nui to address their legitimate demands and claims.

In regard to the criminalization of protest, in October and December 2010, an extra emergency police force was mobilized. 40



Demonstration in support of the Hitorangui clan and their land claims, February 26, 2011. Isabel Burr, Sacrofilms files.

members of special police forces were sent from Chile in October and another 90 were sent in December. The number of detectives on the Island was also increased. The Attorney General appointed a Deputy Prosecutor specifically for the criminal cases arising from the land claims.

In this context, the following events were highlighted:

a. Occupation of Hotel Hanga Roa by the Hitorangui Clan

We were advised that on September 07, 2010, a warrant was issued by the Easter Island Supervisory Judge, Mr. Bernardo Toro, authorizing Police, without prior notice to the accused, to enter, register, and seize from the Hotel certain electronic equipment in risk of being damaged by the "occupiers". Police and detectives entered the Hotel Hanga Roa and began evicting people. The occupiers included children, women, and senior citizens. We were told that the police used unnecessary violence to arrest some occupants.

This event led to a request for precautionary measures from the Inter-American Commission on Human Rights, made through the Indian Law Resource Center, representing the majority of Rapa Nui Clans (filed under Nº MC- 321-10).

On the same day, September 07, members of the Clan returned to occupy the hotel. The occupation lasted until February 06, 2011. This was 2 days before a court hearing before the Easter Island Supervisory Judge of charges against the Hitorangui and of their claim that precautionary measures relating to fundamental guarantees of civil rights do not constitute crimes. The Police allowed more than six months to elapse from the start of the occupations before asserting the crime of usurpation and using their powers under Articles 83° and 206° of the Criminal Procedure Code to carry out violent evictions at the Hotel. That they detained two women using private vehicles owned by the



Violent eviction of the Civic Center on December 3, 2010, which resulted in more than 20 Rapa Nui injured by rubber bullets shoot by Carabineros de Chile and Policia de Investigaciones. Among them was Edith Chavez Atan.

Schiess family, was later denounced by lawyers of the Hito Clan.

Prior to this, in January 2011, the Public Prosecutor's Office issued a search warrant for the Hotel Hanga Roa, based on the crime of usurpation, without legally charging the Hitorangui clan, or holding a court hearing. The warrant was not implemented.

A few days earlier a ban had been placed by Police prohibiting people entering the Hotel Hanga Roa. It is claimed that this was used to harass the Hito family, as food was only allowed into the facilities after those providing it had first been registered and photographed by Police.

The above orders led the Hito Clan to request a hearing for precautionary measures in the presence of the Supervisory Judge, in addition to the pending charges (February 08), and the filing of a complaint based on violation of Constitutional Rights to the Appeals Court of Valparaíso (which was dismissed).

Hitarangui Clan members, after being evicted on February 06, 2011, and formally charged on February 08, 2011, are still awaiting trial for the crime of usurpation. It is claimed that this delay violates their right to due legal process.

b. Civic Center

On December 03, 2010, Police and detectives evicted people from a property in the Hanga Roa civic center, an area claimed by the Tuko Tuki Clan. A total of 17 persons were injured in this episode, and in some cases the "perdigones" (shotshell) used has not been able to be extracted. Some detainees were taken to the Mataveri Police Station while others were taken to the local hospital. The families allege mistreatment inside the Police Station and negligent delay in obtaining medical care. They also denounced the taking down and burning of Rapa Nui flags that flanked the disputed property, by the Police.

This event was included as additional information in the request for precautionary measures to the IHRC and led to a notification being sent to the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Mr. James Anaya.

Subsequently, in mid December, in hearings held in two criminal investigations before the Easter Island Supervisory Judge, the prosecutor formally charged five members of the Tuko Tuki Clan with the crimes of peaceful usurpation and unauthorized entry of abode. In these hearings, precautionary measures were enacted which prohibited access to buildings, by virtue of which the Police then proceeded to evict occupiers from the Civic Center. Clan members denounced the violation of a series of procedural guarantees in the hearings, such as the exclusion of an interpreter requested by the defense. They also denounced the eviction of people who were not included in the precautionary measures but who were still threatened with excessive use of force.

This event led to sending another letter of notification to the United Nations Special Rapporteur on Indigenous Rights, Mr. James Anaya.

c. Riro Kainga Plaza

On December 29, 2010, another violent eviction was carried out in the Riro Kainga Plaza occupied by the Rapa Nui Parliament and members of the Rapa Nui Clan, culminating in several people being injured and 10 arrested, two of whom were left in custody for arms control law breaches. This situation was also notified to the Rapporteur Anaya.

On January 12, 2011, the United Nations Special Rapporteur on Indigenous Rights issued a statement concerning the situation of the Rapa Nui, in which he stated that on January 10, 2001, he recommended the following to the Chilean Government:

> *"(…)to prevent further evictions and to ensure that police presence on the island does not exceed what is necessary and proportionate to ensure the safety of the island's inhabitants. (…)".*
>
> *"I have also urged the Government to make every effort to conduct a dialogue in good faith with representatives of the Rapa Nui people to solve, as soon as possible the real underlying problems that explain the current situation. I believe that it is particularly acute in relation to the recognition and effective guarantee of the right of Rapa Nui clans on their ancestral lands, based on his own customary tenure, in accordance with ILO Convention 169, of which Chile is a party, and other relevant international standards.*
>
> *"Finally, I made an urgent appeal to Government to take the necessary measures to avoid threats or harm to the physical safety of members of the Rapa Nui people and punish those responsible for any excessive or disproportionate use of force during the police operations of eviction."*

On February 07, 2011, the IHRC granted a precautionary measure in favor of the Indigenous Rapa Nui people on Easter Island, in Chile (MC 321/10), requesting the State of Chile to immediately cease the use of armed violence in the execution of administrative or judicial State actions against members of the Rapa Nui, including evictions from public spaces or fiscal or private property; to ensure that the actions of Government agents, in the framework of the protests and evictions, do not put the life or the personal integrity of members of the Rapa Nui people at risk; to inform the IHRC in a period of ten days about the adoption of these precautionary measures; and to update this information periodically.

In addition to the aforementioned Precautionary Measure issued by the IHRC and the Statement of the United Nations Special Rapporteur on Indigenous Rights, the criminalizing of occupation and accompanying police abuse generated a series of denouncements by the Rapa Nui and their representatives. They held marches and demonstrated, filed written

complaints with the authorities, filed lawsuits alleging police abuse, as well as engaging with Parliament members and the National Human Rights Institute, which has reported on the situation.

In our view, the land occupations are a strong, determined call for the Island lands to be returned to Rapa Nui control. The land claims described above are all on the main street, in a small area that the State ring-fenced for Rapa Nui occupation after they were forcibly removed from their lands and sent to Hanga Roa in the late 19th century.

2.2.2 Return of Lands

Whether lands should be returned to the Rapa Nui in individual land titles or under collective title is something that needs to be worked out by the State with Rapa Nui, within the framework set by international standards and respecting traditional Rapa Nui land uses. It is important not to be stalled by paternalistic fears, such as those expressed by a Chilean government authority who told us that returning lands to families will only create inequality among its members.

Ancestral indigenous ownership of a collective nature enjoys widespread recognition in international human rights laws, through legal instruments ratified and in force in Chile, as well as under the Indigenous Law.

Article 1° of Chilean Indigenous Law N°19,253 of 1993 recognizes that for *"indigenous peoples of Chile...the land is the main foundation of their existence and culture"* and places a duty on the Chilean government to promote and respect their lands: ***"[I]****t is the duty of society in general and the State in particular, through its institutions, to respect, protect, and promote the development of indigenous peoples, their cultures, families, communities, adopting the appropriate measures for said purposes and* ***to protect indigenous lands,*** *ensure their appropriate exploitation, their ecological balance, and favor their expansion".*[45]

ILO Convention 169 requires Governments to respect the special importance of indigenous peoples' relationship with their lands and territories, understood as *"the total environment of the areas which the peoples concerned occupy or otherwise use"*.[46] The Convention states that the right to ownership and possession of lands traditionally occupied must be recognized and that the use of lands to which they have had historical access must be ensured, including lands not exclusively occupied by them. In addition, it compels State parties to take the steps necessary to identify such lands and to establish adequate procedures within the national legal system to resolve land claims.[47]

It is important to keep in mind that the committees who supervise the ILO Convention 169 have been adamant in maintaining that the right to land ownership under Article 14 not only obliges States to protect and recognize those lands legally owned by indigenous peoples, but also includes traditionally occupied lands to which they do not have legal title.

Thus, the ILO Committee of Experts on the Application of Conventions and Recommendations, with respect to a claim filed for the violation of ownership rights of indigenous peoples in México in 2009, stated the need to acknowledge traditional ownership. The Committee stated in its 2009 report:

> *"If indigenous peoples are unable to enforce their traditional occupation as a source of ownership and possession rights, Article 14 of the Convention would be emptied of content. The Committee is aware of the complexity of turning this principal into legislation, and of designing adequate procedures, but stresses at the same time that the recognition of traditional occupation as a source of ownership*

45 The highlighting is ours.

46 Article 13 of the ILO Convention 169.

47 Article 14 of the ILO Convention 169.

and possession rights through an adequate procedure, is the cornerstone upon which the system of land rights lies, established by the Convention. The concept of traditional occupation may be reflected in different manners in national legislation but it should be applied". [48]

At the same time, Article 26.1 of the Declaration on the Rights of Indigenous People states that Indigenous Peoples have the right to *"the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired"*, including not only the lands that they *"traditionally occupy"* but also lands that have been confiscated illegitimately. This is reinforced by Article 28, which states:

> "[The] *right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent".*

The Inter-American Court of Human Rights has adopted and developed land rights in its jurisprudence. Since the *Awas Tingni* case, it has insisted on the importance of recognizing the close ties of indigenous peoples with their lands, emphasizing that *"they must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival".*[49]

In *Awas Tingni vs. Nicaragua* (2001), the Court declared a violation by Nicaragua of Article 21 of the American Convention of Human Rights ["ACHR"], which protects the right to land ownership, because it had not ensured *"the use and enjoyment of the properties of the Community members; it has not delimited and demarcated its communal property, and has granted concessions to third parties for the exploitation of assets and resources located in an area which may correspond, fully or partially, to the lands which should be delimited, demarcated and titled".*

Awas Tingni recognizes and establishes:

1. The value of communal property of indigenous peoples under Article 21 of the ACHR;
2. The validity of the possession of land based on indigenous customs, even in the absence of land titles, as being the fundamental basis of their ownership;
3. The need for the close relationship that indigenous people have with their land to be recognized and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival; and
4. The obligation of States to delimit, demarcate, and give titles to community territory.

The Court has reaffirmed its interpretation of the scope of indigenous land rights in later cases. It has recognized rights of a communal nature over ancestral lands to communities in *Yakye Axa vs. Paraguay (2005), Sawhoyamaka vs. Paraguay (2006), and Xámok Kásek vs. Paraguay* (2010).

Unlike the *Awas Tingni* case in which the land claimed by the indigenous peoples was held by the State, in these cases the land was owned by private third parties.

In the *Yakye Axa* case, the Court ruled that indigenous communal property prevailed over private property. It held that the ACHR recognizes the subordination of the use and enjoyment of properties to social interests and the close ties of the indigenous peoples to natural resources associated with their culture. It recognized the spiritual elements that emerge from their cultural relationship and which must be safeguarded under Article 21 ACHR.

48 INTERNATIONAL LABOR CONFERENCE, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1a) General Report and referring to certain countries*, International Labor Conference, 98th session, 2009, p.742.

49 Inter-American Court, Case of the *Mayagna Community (Sumo) Awas Tingni vs. Nicaragua* (2001), parag. 149.

The State was ordered to adopt measures to return traditional lands to the community, or if impeded in doing so, to provide the community with land of the same size and quality, chosen by agreement with community members.

In the *Sawhoyamaxa* case, the Court found that Paraguay violated the community's right to communal ownership. It held that possession of land is not necessary for recognition of ownership by the State and that indigenous ownership rights over their ancestral lands are not extinguished while they maintain their relationship with their lands, whether material or spiritual.

In *Xámok Kásek*, the Court reaffirmed this jurisprudence, which has been systematized by the IHR Court as follows:

> *"[T]he Court recalls its jurisprudence in respect to communal ownership of indigenous lands, according to which: 1) traditional possession of indigenous people of land has effects equivalent to a property ownership title granted by the State; 2) traditional possession grants to the indigenous peoples the right to demand official recognition of ownership and its registry; 3) the State must delimit, demarcate, and grant collective title of lands to indigenous community members; 4) members of indigenous peoples that for reasons beyond their control have left or lost possession of their traditional lands retain the right of ownership over them, even in the absence of legal title, unless the lands have been lawfully transferred to third parties in good faith, and 5) members of indigenous peoples who have unwillingly lost possession of their lands, and these have been legitimately transferred to innocent third parties, have the right to recover them or obtain other lands of equal size and quality".* [50]

In establishing parameters for determining when the relationship of indigenous peoples with their traditional lands provides a justifiable claim to the land, the Court stated:

> *"[T]o determine the existence of the relationship of indigenous peoples to their traditional lands, the Court has established that: i) it can be expressed in different ways depending on the indigenous people concerned and the specific circumstances that exist, and ii) the relationship with the land must be possible. Some forms of expression of this relationship could include the traditional use or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; hunting, fishing or harvesting seasonal gathering or nomadic activities; use of natural resources associated with their customs, and any other element characteristic of their culture. The second element implies that the community members are not prevented, through no fault of their own, to perform those activities that reveal the persistence of their relationship with their traditional lands".* [51]

Additionally, *Saramaka community vs. Suriname* (2007), the Court concluded that Article 21 of the ACHR protected the right to self-determination of indigenous peoples. It found that, in order to provide for continuity of their economic, social, and cultural lifestyle, they are entitled to use and enjoy the natural resources of ancestral lands traditionally occupied by them necessary for their own survival.

The Court made a clear link between the rights to ancestral property and the self-determination of indigenous peoples, based on the application of the United Nations Committee on Economic, Social, and Cultural Rights of common Article 1 and the Covenants on indigenous peoples.[52] The Court interpreted Article 21 of

50 Inter-American Court, Case of the *Xámok Kásek Community vs. Paraguay* (2010), paragraph 109.

51 Inter-American Court, Case of the *Xámok Kásek Community vs. Paraguay* (2010), paragraph 112.

52 Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of

the ACHR as including the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural, and economic development as established in the Covenants. It stated that Article 21 of the American Convention cannot be interpreted as limiting the enjoyment and exercise of the rights recognized by Suriname in these Covenants.[53]

The situation in Aotearoa New Zealand is an example of the types of future problems that can arise if land is returned in collective title. It may be helpful to review models of collective land ownership in Aotearoa and other parts of the Pacific to learn about the types of problems encountered and how these have been overcome.

Around 70 percent of Rapa Nui lands are held by the State of Chile. A large part of this land is protected as conservation land under the Rapa Nui National Park. This designation was made without the consent of the Rapa Nui, who are also excluded from participating in the administration of the Park.

We suggest that a system for co-managing the Park with the Rapa Nui people be explored. We are aware that successful, workable models of co-management exist in other countries in Latin America, in Aotearoa and may exist in other countries as well.

The guidelines proposed by the International Union for Conservation of Nature ["IUCN"] are helpful, as they recognize Indigenous peoples' and Community Conserved Areas ["ICCA"] and define them as *"protected areas where the administrative authority and the responsibility is held by indigenous peoples and/or local communities under diverse forms of institutions, norms, customary or legal, formal or informal"*. This definition includes two large categories: 1. Areas and territories of indigenous peoples that are established and managed by them and 2. Community conserved areas that are established and managed by the community.

Moreover, in the 2008 World Congress, the IUCN adopted 2 important resolutions:

1. Resolution 4,049 calls upon IUCN members to:

   "(a) Fully acknowledge the conservation significance of Indigenous Conservation Territories and other Indigenous Peoples' and Community Conserved Areas - (ICT and IPCCA) – comprising conserved sites, territories, landscapes/seascapes and sacred places - governed and managed by indigenous peoples and local communities, including mobile peoples;

   (b) support the fair restitution of territorial, land and natural resource rights, consistent with conservation and social objectives as considered appropriate by the indigenous peoples and local communities governing existing ICTs and IPCCAs and/or interested in establishing new ones;

2. Resolution 4,038 on recognition and conservation of sacred natural sites in protected areas, including *"…springs of pure water, glaciated mountains, unusual geological formations, forest groves, rivers, lakes and caves - are today and have long been integral to human identity, survival and evolution"*. It also states *"…that urgent action is needed for culturally appropriate sacred natural site conservation and management within (and near) official protected areas"*.

These IUCN guidelines, and the International Human Rights Law applicable to the Rapa Nui, support the Chilean State restoring the lands traditionally occupied by the Rapa Nui, as "indigenous conservation territories" under their ownership and administration.

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the Covenant. Final Observations on the Russian Federation (the thirty-first session). UN DocE/C.12/1/Add.94, December 12, 2003, paragraph. 11, in which the Committee expressed concern about the "*precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant.*"

53 IHR Court. *Case of the Saramaka people vs. Surinam* (2007). Preliminary exceptions, Fund, Repairs and Costs, paragraphs 93, 94 and 95.

3. RIGHTS OF INDIGENOUS PEOPLES IN CHILE

In Chile, the Rapa Nui situation is framed within a general context covering several distinct indigenous groups. Rapa Nui do not have constitutional recognition, nor is there any official mechanism for consulting with them or ensuring their political participation. In spite of ILO Convention 169 being in force since September 2009, no clear measures for its implementation exist.

During our visit most of the officials interviewed, as well as those consulted informally by us, stated that the government was applying an ad hoc consultation process to indigenous peoples. It was viewed as being inadequate because it sought to achieve contradictory government objectives. These were identified as follows:

- Providing constitutional recognition to indigenous peoples;
- Establishing a new institutionalized indigenous framework suitable to government;
- Regulating environmental institutions and providing for indigenous participation;
- Gaining approval for investment projects involving indigenous land and natural resources, and
- Determining an acceptable consultation process with indigenous peoples.

In our view, trying to establish a complete relationship model between the State and the indigenous peoples without first developing a clear institutionalized process for consultation has undermined the entire process.

We are aware that this situation has altered since our visit in August 2011. Resistance by indigenous peoples to inadequate consultation processes has reduced discussions to "consultation about the consultation process". We are concerned that no further progress has been made.

Decree 124 is seen as negating the consultation process under ILO 169, which, if properly conducted, would involve providing information, establishing open dialogue, and then implementing the will of the indigenous people. It would also involve obtaining their consent in regard to public decisions or policies, or proposed legislation that affects them. In this regard, we have been informed that indigenous peoples have called for the repeal of Decree 124 and a halt to mining and forestry investments, and any other projects which are intended to be carried out on Indigenous lands, because proper consultation has not yet occurred.

The Vice-President of the Senate of the Chilean Government, the Institute of Human Rights, and Mapuche representatives, with whom we met, all spoke of the need to look at and redefine the content and processes of consultation. They stated that it was necessary for the Rapa Nui to exercise control over their internal affairs and for the State to support this change. Instead, however, Chile has criminalized protests over long-standing land claims in 2010 and 2011. This is a situation that deeply concerns us.

Finally, we received widespread complaints about indigenous interests being undermined by the State's "indigenous" agencies, which are managed and controlled by the State to meet its own economic needs and those of private investors. Even though these agencies have indigenous representatives, representation is in the minority and limited to the role of "advisors". There is no obligation to uphold indigenous views.

Mapuche representatives in Santiago argued that Chilean legal structures must be modified to reflect the social and cultural needs of the people who are on the land, according to how they identify themselves. Such structures should not simply be imposed by the government, as it cannot represent indigenous interests without their permission.

4. CONCLUSIONS

The relationship between Rapa Nui and the State of Chile is weak, and has recently been one of direct conflict. It is characterized by mistrust that is based not only on historical precedents, but also on recent events that have involved the violation of Rapa Nui human rights by the State.

The historical literature consulted (including the Report by the Historical Truth and New Deal Commission, official documents issued by the Chilean State), and testimonies gathered on the island, all indicate that the annexation of Easter Island to Chile was realized by means of an Agreement of Wills in 1888 between the Ariki (King), Atamu Tekena, and a representative of the State of Chile, the Naval officer, Policarpo Toro.

Under this Agreement of Wills, an equitable relationship between the two peoples was established in which the Rapa Nui accepted the Chileans as "friends", but reserved their lands and their right to govern the territory by their own authorities. This has never been respected by Chile.

We were informed that the island was leased to foreign capital and the Rapa Nui were confined to a small area of the island and subjected to a system of semi-slavery. They were deprived of the civil and political rights enjoyed by other Chileans until 1966 when they were finally granted citizenship.

After the enactment of the "Ley Pascua" in 1966, and in line with the recognition of the Rapa Nui as citizens, a Chilean administrative system was established for the island and public services were installed.

In spite of the above, the relationship between the two peoples is marked by unequal treatment by the Chilean state, which still does not recognize the 1888 Agreement of Wills and imposes its own conditions on the Rapa Nui.

The regime imposed by Chile on the Rapa Nui violates internationally recognized human rights of indigenous peoples to territory, self-determination and political participation.

Chile confiscated the entire territory of Easter Island from the Rapa Nui in 1933, when it registered the territory in its name. This registration was repeated in 1967, after the establishment of the Recorder of Deeds Office on Easter Island. Since registration, a few small plots of land have been granted to the Rapa Nui in individual land titles, while the Chilean State remains in possession of over 70% of the territory.

The violation of Rapa Nui territorial rights is closely linked to the recent criminalization of social protest. Rapa Nui viewed peaceful occupation as a legitimate way of supporting their land claims. In their view, these actions were met by excessive force by a Chilean state intent in its desire to repress.

Regarding the right to self-determination, we found the Rapa Nui demand for some form of self-government to be widely held, and even supported by some Chilean government members. The Chilean government, however, has not met this demand, despite signing the United Nations Declaration on the Rights of Indigenous Peoples. The "Special Statute" that it is formulating for Easter Island does not meet international standards set under the Declaration.

Finally, we conclude that the Rapa Nui situation is hampered by continuing to be framed within the general context for recognizing ALL indigenous rights in Chile. This has resulted in a lack of constitutional recognition of the special circumstances of Rapa Nui and a total lack of implementation of ILO Convention 169 in force in Chile since September 2009 especially in regard to political and territorial rights, consultation and criminalization of political protests.

5. RECOMMENDATIONS

5.1. As a general recommendation

The observers believe that the Chilean government should review its relationship with the Rapa Nui people and reconstruct it on the 1888 Agreement of Wills. This document should be recognized as an International Treaty which led to the annexation of Easter Island by Chile, and as laying the foundation for an ongoing institutional relationship with Rapa Nui. That relationship must be fair and equal and it must guarantee full participation of the Rapa Nui, as well as their rights to territorial and self-determination in a form acceptable to them.

This view is supported by the National Commission on Historical Truth and Reconciliation, which expressly states with regard to the Rapa Nui that:

> *"Taking into consideration the above and also the geographical particularities of Easter Island and the ethnic and demographic composition that characterizes it, the Commission is of the view that the commitments made between the Rapa Nui people and the State of Chile under the "Agreement of Wills" are fully contemporary and are an excellent basis for building an equitable relationship between the State of Chile and the Rapa Nui people, in the present historical moment. In this context, it is recommended to adopt the following measures:*
>
> *1. To ratify the Agreement of Wills by the National Congress which should be approved as Law, because it contains general and mandatory norms that establish the essential bases of the legal system that will thereby regulate the relationship between the State of Chile and the Rapa Nui peoples, in accordance with that provided in Article 60 N° 20 of the Constitution of the Republic.*
>
> *2. To grant an autonomous status for Easter Island, in accordance with the normative assumptions of the "Agreement of Wills".*
>
> *3. To recognize the exclusive right of the Rapa Nui to land ownership on Easter Island, and to promote plans and programs to ensure the effective exercise of this right. This requires repeal of article 1° of the L. Decree. 2.885 of 1979, currently in effect in accordance with article 79 of the Law 19.253 of 1993, which allows non Rapa Nui persons to be beneficiaries of Easter Island lands.*
>
> *4. To promote and fund programs aimed at guaranteeing the well being and development of the Rapa Nui people. In this context, it is considered as a priority to provide Easter Island with its own budget, which enables funding such plans and programs. The budget should be defined by the Executive power at the central level, in direct coordination with the recognized authorities in Easter Island."*[54]

5.2. Recommendations made by the National Commission on Historical Truth and Reconciliation

We also share other recommendations made by the National Commission on Historical Truth and Reconciliation, especially those concerning the protection and conservation of Cultural and Natural Heritage. We recommend the

54 *National Commission on Historical Truth and Reconciliation Report*, second part of recommendations, Page 571. Available at: [http://www.memoriachilena.cl/upload/mi973056855-2.pdf], translated by the authors of this report.

recognition of the language preservation rights and declaration of official language as Rapa Nui, the protection and administration by the Rapa Nui people of water resources and groundwater, the protection of the coastline and declaration of the entire Rapa Nui territory as Indigenous.[55]

5.3 Right to self-determination of the Rapa Nui

We recognize the right to self-determination of the Rapa Nui under the 1888 Agreement of Wills and international human rights law, particularly the United Nations Declaration on the Rights of Indigenous Peoples. In this regard, we understand that the Rapa Nui demand for self-determination is oriented toward exercising autonomy in the form of self-government rather than complete independence from Chile.

We consider the development of a statute that defines the foundations for a regime of autonomy in internal and local affairs essential. Its formulation must include the active participation of the Rapa Nui, using their own representative institutions. It must allow them to set their own priorities for economic, social, and cultural development, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.

5.4. Legislation to control migration to Rapa Nui

We consider the establishment of legislation to control migration to Rapa Nui to be essential. Its contents should be formulated together with the Rapa Nui, fully respecting the international standards for proper consultation with indigenous peoples. This should be done in a way that ensures the preservation of the culture of the Rapa Nui and the protection of the island territory as a fragile ecosystem that is especially vulnerable to irreversible environmental deterioration.

In order to uphold their right to self determination, the migration control system should either be administered by the Rapa Nui, or through a system of co-management by the Rapa Nui and Chilean state.

5.5. Recognize traditional ancestral Rapa Nui land ownership

We believe that the State should recognize traditional ancestral Rapa Nui land ownership based on international human rights law applicable to indigenous peoples and in compliance with the 1888 Agreement of Wills. This requires the regularization and return of lands that were granted by means of temporary land titles or assignment of rights by the State of Chile to members of the Rapa Nui in Hanga Roa, and which are currently being held by the State of Chile or by third parties other than the Rapa Nui, as well as lands that were confiscated by the state registration of Island lands.

Whether land should be returned in collective or individual title is something that should be discussed and decided with the Rapa Nui, but it should be held in a form that is secure from future appropriation by the Government or foreign interests.

We support the administration by the Rapa Nui of such lands as indigenous conservation territories and sacred sites in accordance with IUCN guidelines.

5.6. The criminalization of Rapa Nui social protest should cease

We recommend that the criminalization of Rapa Nui social protest should cease and that the State should refrain from further actions involving violence against the Rapa Nui, particularly the use of disproportionate police force against

55 *National Commission on Historical Truth and Reconciliation Report*, second part of recommendations, p. 559. Available at : [http://www.memoriachilena.cl/upload/mi973056855-2.pdf]

those involved in peaceful occupation. Peaceful resolution of conflict should always be sought, through intercultural dialogue and with full recognition and respect for the rights of the Rapa Nui.

5.7. We share the concern of various international human rights organizations relating to the situation of indigenous peoples in Chile.

In this regard, we agree with and adopt the recommendations made by the Special Rapporteur on indigenous rights, as proposed to the Chilean government in his 2009 report, and highlight those that, according to what we verified during our visit, are applicable to the Rapa Nui:

to proceed with the constitutional recognition of the indigenous peoples and their rights of consultation, in compliance with ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples;

to carry out a process of consultation with the indigenous peoples about the definitive consultation procedure to be implemented prior to taking any action or measure that may directly affect these peoples;

to establish a mechanism for recognizing the rights of indigenous peoples to land and natural resources based on ancestral occupation and use, resolving pending land claims and providing more resources to the government institutions responsible for this; and

to adapt current legislation, involving both public policies and sectorial laws as well as procedures for the acquisition of land, according to the standards of the ILO Convention 169 and international law.

ANNEX

VIOLATIONS OF THE RIGHTS OF THE RAPA NUI PEOPLE AND RAPA NUI INDIVIDUALS, ACCORDING TO THE AMERICAN CONVENTION ON HUMAN RIGHTS[1]

Article 5. Right to Personal Integrity

It is often said that the moral integrity of the Rapa Nui has been denied by the State of Chile throughout the history of Rapa Nui. The usurpation of their ancestral lands by the Chilean Government and their forced relocation to a small and enclosed area on the island is a continuous abuse that must be rectified. The restrictions of the freedom of movement of the Rapa Nui on the island deprive them of the freedom of access to their traditional territories and of the use and development of their resources because these are under State control. The historical consequence of these actions is to significantly undermine the cultural, social, and economic wellbeing and development of the Rapa Nui.

The Rapa Nui believe that their dignity as a people is gravely undermined by the Chilean system of control over their lands. While international agreements such as ILO Convention 169 speak extensively of "consultation" and "consent" in relation to activities carried out in their traditional lands, Decree 124 weakens the due process guarantees of the legal system in order to ensure that the objectives of the State will prevail when clashes occur with indigenous interests.

Article 6. Prohibition of Slavery and Servitude

Up until 1966, the Rapa Nui had no citizenship rights and they were pressured to work as forced labor.

Article 7. Right to Personal Liberty

Evictions without a Court order. The evictions from the Civic Center were not preceded by a "court order for eviction". The occupants who had been charged the day before at the initial hearing in court were ordered not to approach the "residence of the victim", by which was meant the building located on the land being claimed. The following day, in the presence of a large police contingent, the authorities ordered these injunctions to be executed ***ex oficio*** (without the request of the victim) and precipitated the incidents described above.

The response of the State, which consisted of shooting at seventeen people, was disproportionate to the objective of putting an end to the activity of the protesters occupying the public buildings.

Article 8. Judicial Guarantees

It was indicated to us that in the initial criminal hearings in December 2010, during which charges were laid against members of the Tuko Tuki Clan, a series of procedural safeguards were violated. They included the denial of the right to have an interpreter present, as requested by the defense, in order to present the cultural aspects of the case in the language of the Rapa Nui and in accordance with traditional law. Moreover, it was alleged that people were evicted who were not listed in the injunctions prohibiting certain persons from approaching the land in question, and that these people were threatened with violence.

1 Author of this Annex: Professor Nin Tomas.

Also, we heard claims that rights were violated that are expressly guaranteed by Subsection 3 of Article 54 of Law N° 19,253 on Indigenous Peoples, and under international laws recognized by Chile. There is a State obligation to respect and take into account the customs of indigenous peoples when implementing national legislation, and to guarantee that native people can both understand and be understood in legal proceedings (Articles 8 and 12 of ILO Convention 169). An individual also has a right to be informed in his/her own language of any criminal charges, and to rely on the services of a translator (Article 14 of the Covenant on Civil and Political Rights).

In this respect, mention should be made that language is more than just words and sentences, and that true depth of meaning cannot be communicated or achieved by imposing the use of the dominant language (Spanish) on those whose mother tongue and concepts of justice are derived from within a different cultural context. Comprehension is better achieved through recognizing and applying the values, customs, and rules that are inherent in the ***tangata henua*** mother tongue.

Article 13. Liberty of Thought and of Expression

Article 8 is supported by Article 13, which guarantees liberty of thought and expression. The right includes a peoples' right to search, receive and distribute information and ideas of any kind through the media of their choice. Refusal to allow the use of the Rapa Nui language in Court is a violation of Articles 8 and 13, which support each other.

In the public protests during which public areas and property were occupied, no real threat ever existed to the rights of others, to their reputation, or to national security, such as might have justified the excessive limitations placed on the protestors. In this sense, the State's response was truly disproportionate.

Article 15. Freedom of Assembly

The Chilean State's response in criminalizing Rapa Nui protests is disproportionate, considering the absence of a direct threat to public security, wellbeing or to public morality presented by Rapa Nui Clans who were protesting to recover their ancestral lands. Their acts of protest did not interfere with the rights of other members of the public. It appears that the State triggered the violence of the protesters by forcibly removing them from the land. And when the protesters reacted, the authorities used excessive violence to repress a situation they themselves had created, and then justified their use of undue force by criminalizing legitimate protest.

In this respect, people told us repeatedly that the evictions were not backed up by a court order.

Article 16. Liberty of Association

This right was forcibly violated by the police force, and by the authorities' criminalizing the actions of legitimate protest carried out by the Rapa Nui.

Article 20. The Right to a Nationality

The Rapa Nui identify themselves as a people of the Pacific, rather than as members of Chilean society. With respect to a people's collective self-identity, the Inter-American Court is of the opinion that the identity of each indigenous community *"is a social-historical fact that is an essential part of the indigenous people's autonomy"*, whereby it is up to the community in question to determine its own name, composition and ethnic belonging; the State or other external agencies cannot decide on their behalf or contest this matter: *"the Court and the State must limit themselves to accepting the decisions made by the Community in this regard, that is, in the manner which the latter identifies itself"*.

This right should be interpreted in conjunction with the right to political participation established in Article 23, so that indigenous peoples, in accordance with their ethnic belonging, shall decide and determine their own representative institutions.

Article 21. Right to Property

All the jurisprudence developed by the IHR Court is applicable to the Rapa Nui case, based on the ***Awas Tingi*** case.

Article 23. Political Rights

The right to "participate in the conduct of public affairs" is based on the necessity to guarantee that the "freely elected representatives" may ensure a fair balance between the interests of the State and the Rapa Nui, in as much as the Rapa Nui define themselves as a distinct group with a distinct ancestry, different from that of the State that rules them.

The meaning of the term "participate" goes far beyond the need for the State to share information with the Rapa Nui, or the State informing itself of Rapa Nui points of view: it also means implementing the decisions and resolutions that are negotiated with the duly mandated and elected representatives of the Rapa Nui.

In this regard, the IHR Court has emphasized the obligation of the State to ensure the participation of indigenous peoples, through their own representative institutions, in the affairs that affect them, and has also recognized the relationship that exists between this right and the rights of participation and of free and informed consent set out in ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples.

Article 24. Equality before the Law

Under Chilean Law, the Rapa Nui have the right to protection "as Rapa Nui". Their special condition of "Tangata Henua" – people of the land of Rapa Nui, and their ancestral rights to their territories should also be respected. These latter rights have not been recognized by the Chilean State, and the failure to do so affects the dignity of the Rapa Nui, as individuals, and as members of an egalitarian society.

Article 25. Judicial Protection

We were told that the Rapa Nui do not have the right to a simple, expeditious, and effective legal recourse that might enable them to exercise their human rights to claim their ancestral lands and exercise their right to free determination as a People.

Article 26. Progressive Development of Rights

In the case of Rapa Nui this means helping the islanders to achieve self-determination by means of dialogue between the State and Rapa Nui leaders, and the implementation of the necessary local and constitutional changes needed to ensure positive results for the islanders. The role of the State is to aid this development, and not to put obstacles in its way by perpetuating an administrative system based on laws that jeopardize the self-determination and self-realization of the Rapa Nui. To attain this objective, greater dialogue is needed between the Rapa Nui and the State, as well as a genuine desire on the part of the State to recognize the interests of the Rapa Nui, particularly when these interests do not coincide with the economic development agenda being pursued by the State.

INTERVIEWS

- Carmen Cardinali Paoa, Rapa Nui Governor;
- Jacobo Hey, Court clerk and former Governor of Rapa Nui;
- Luz Zasso Paoa, Rapa Nui Mayor;
- Juan Pablo Letelier, Senator and Vice-president of the Senate;
- Carlos Llancaqueo, Presidential Commissioner for Easter Island;
- Alfredo Seguel y Sergio Millaman, Mapuche, Grupo de Trabajo por Derechos Colectivos (G-TDC);
- Lorena Fries, Director of National Institute of Human Rights;
- Members of Rapa Nui Parliament;
- Members of Te Moana Nui A Kiva;
- Members of the Rapa Nui women organization Makenu Re'o Rapa Nui.

OTHER ACTIVITIES

Participation in seminar on "Los Derechos Humanos de los Pueblos Indígenas y sus implicancias para el Rapa Nui people" (The Human Rights of Indigenous Peoples and their implications for the Rapa Nui People), held in Hanga Roa on August 1st and 2nd, 2011 summoned by the Rapa Nui Parliament, the Rapa Nui women's organization, Makenu Re'o Rapa Nui, Conadi's National Indigenous Council for Rapa Nui People, Rapa Nui clans, Indian Law Resource Center, and Observatorio Ciudadano (Citizen's Observatory), with the participation of about one hundred representatives of the most important organizations of the Rapa Nui people.