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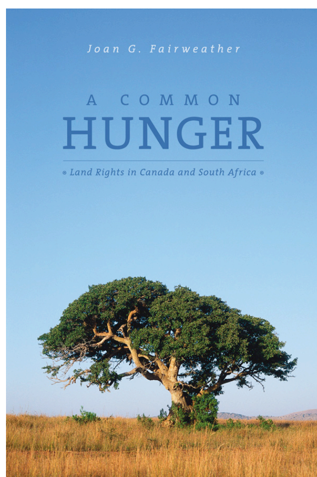

A COMMON HUNGER: LAND RIGHTS IN CANADA AND SOUTH AFRICA

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Conclusion

WHY LAND RIGHTS MATTER

A common hunger for land and human dignity has compelled many indigenous communities worldwide to reclaim their territories, farms and hunting grounds and to demand an equitable share in the wealth-producing resources they contain. For the indigenous peoples of Canada and South Africa, the recognition of land rights represents the first step in their recovery from an abusive past which has stripped them of their basic means of livelihood and of their dignity as human beings. As the case studies in this book clearly demonstrate, land represents much more than economic commodities to be managed and exploited. As Joe Seremane, South Africa's first land claims commissioner expressed it, "Land is a birthright. The umbilical cord between us and mother earth that tells us where we belong. Like the womb, earth is the source of life. When we die, we return to the earth. This is why land is important."[1] When the issue of land rights are viewed from this perspective, it becomes clear that indigenous peoples are not asking for charity. Nor, as the Gitxsan and Wet'suwet'en chiefs in the *Delgamuukw* case argued, are they asking for some frozen rights from an historic icebox. They are asking for what they believe is rightly theirs – they are asking for justice.

There are many reasons why countries like Canada and South Africa should feel compelled to respond to their demands. Apart from Constitutional obligations to protect the human rights of all their citizens, there are practical reasons for providing mechanisms for land restitution. In Canada, there are recognized treaties between the state (or Colonial powers) and First Nations, that must be honoured. This is required by the justice system and rule of law under which Canada is governed. Secondly, although the aboriginal population is not very large, it is capable of arousing strong public opinion. Confrontations over land, such as those that occurred at Oka in 1990 and at Ipperwash Provincial

Commemoration of the Oka Crisis, Kanesatake, Quebec, August 1991.

Park five years later, are costly both in dollars and in public image. The federal government has a vested interest in preventing such outbursts of Indian anger from happening again.

The South African government has different reasons for addressing the issue of land rights. A century of white supremacist rule has created a situation of widespread poverty and hunger for land, affecting the vast majority of South Africa's indigenous population. In February 1994, before the elections were even scheduled, 353 rural communities held a Land Conference to set out its demands for the new South Africa. The Preamble to the Land Charter that emerged from this conference begins with these words:

> We, the marginalised people of South Africa, who are landless and land hungry declare our needs for all the world to know.
>
> We are the people who have borne the brunt of apartheid, of forced removals from our homes, of poverty in the rural areas, of oppression on the farms and of starvation in the bantustans. We have suffered from migrant labour which has caused our family life to collapse. We have starved because of unemployment and low wages. We have seen our children stunted because of little food, no water, no sanitation. We have seen our land dry up and blow away in the wind, because we have been forced into smaller and smaller places.

Aboriginal land rights demonstration, Ottawa, Ontario, June 2001.

> We look forward to the birth of a new South Africa. But for us there will be nothing new until there is land and services and growth. These are the biggest difficulties facing our country in the future.
>
> We will not sit back and watch the wealth build up in the cities, while on the edge of the cities, in the small towns and in the countryside, we continue to suffer and starve. These are our demands.[2]

This, then, is the driving force behind South Africa's land policy: the overwhelming urgency to address the demands of thousands of landless people and to build a new country on the foundations of racial equality and human rights for all South Africans.

THE TASK OF NATION-BUILDING IN SOUTH AFRICA

In South Africa, the task of knitting together a society torn apart by decades of racial discrimination and conflict is being addressed on a number of fronts. Since his release from prison on 11 February 1990, Nelson Mandela has shown South Africans a new image of itself; the image of a non-racial, inclusive society. The foundation stone of the new South African democracy is racial inclusiveness. In one of his first public addresses at a rally in Durban, Mandela declared: "We are com-

mitted to building a single nation in our country. Our new nation will include blacks and whites, Zulus and Afrikaners, and speakers of every other language."[3]

One of Mandela's most important gifts to South Africa – and indeed to the world – is his wonderful knack of walking through the invisible barriers that continue to divide South African society. At a 2002 centennial celebration of the Anglo-Boer War (1899–1902) in South Africa, Mandela astonished the entire country by attending a wreath-laying ceremony commemorating Danie Theron, a Boer scout who had been killed in the war, at the Voortrekker Monument in Pretoria. Instead of seeing Theron as a member of the "other side," as an Afrikaner and therefore one of his oppressors, Mandela chose to see him as a freedom fighter, someone who, like himself, had fought for the liberation of his people. Mandela's words that day chartered a new course for South Africans to follow: "That we have had grave and deep differences with some of the political leaders from this [Afrikaner] community, and with the racial policies emanating from them, in no way detracts from our sense of appreciation for the role of Afrikaners in building our common land."[4]

Thabo Mbeki, who took over from Mandela as president in 1998, has expressed his vision of a new South Africa through the spoken word. This was no reformulation of an often-told story, but a narrative of inclusiveness that holds out the possibility of wholeness and healing. Here is a brief extract from Mbeki's statement as Deputy President on the occasion of the adoption of the Republic of South Africa's Constitutional Bill on 8 May 1996:

> I am an African. I owe my being to the hills and the valleys, the mountains and the glades, the rivers, the deserts, the trees, the flowers, the seas and the ever-changing seasons that define the face of our native land. . . .
>
> I owe my being to the Khoi and the San whose desolate souls haunt the great expanses of the Beautiful Cape. . . .
>
> I am formed of the migrants who left Europe to find a new home on our native land. Whatever their actions, they remain still part of me …
>
> In my veins courses the blood of the Malay slaves who came from the East. Their proud dignity informs my bearing, their culture a part of my essence.
>
> I am the grandchild of the warrior men and women that Hintsa and Sekhukhune led, the patriots that Cetshwayo

and Mphephu took to battle, the soldiers Moshoeshoe and Ngungunyane taught me never to dishonour the cause of freedom …

I am the grandchild who lays fresh flowers on the Boer graves…

I know what it signifies when race and colour are used to determine who is human and who is not.…

All this I know and know to be true because I am an African![5]

Implicit in this statement is Mbeki's vision of an African Renaissance – a revitalization of African languages, African traditions, African domination in all spheres of life in order to restore the dignity and prosperity of all his people.

In post-apartheid South Africa, the task of retelling the past from a more inclusive perspective has been taken up by a broad range of people, from community leaders and museum directors to playwrights and politicians. In 1999, for example, the Griqua descendants of Saartje Baartman, a Khoikhoi woman who was taken to Europe in the nineteenth century and displayed as a "Hottentot Venus," demanded the return of her remains to South Africa from the Musée de l'homme in Paris. Another Khoikhoi woman, Krotoä (Eva), who was banished to Robben Island in the 1600s as an unfortunate misfit, has been reclaimed by an Afrikaner writer as *onse ma* (our mother).[6] Most significantly of all, Khoikhoi and San communities are demanding the restoration of their stolen land and restitution in the form of compensation and a share in the wealth produced on their ancestral lands.

The history of black South Africans is also being retold. The Voortrekker Monument in Pretoria, with its larger-than-life engraved murals of white women and children being massacred by the Zulus, and vivid tapestries celebrating the heroism of the Voortrekkers, no longer dominates the depiction of South Africa's past. Ordinary people, like Muriel Ncwana in Guguleto (Cape Town) are celebrating their cultural heritage – in this case, by opening a restaurant serving traditional Xhosa cuisine. Over the past decade, memorials to heroes like Stephen Biko, the Black Consciousness leader, and Hector Peterson, the first victim of the 1976 Soweto Student Uprising, have been erected, streets and towns renamed, and museums constructed to recall the bravery and sacrifices of the men and women who faced the onslaught of a terrible regime. The Robben Island Museum, housed in the former prison where Nelson Mandela and many others were incarcerated, is a vivid reminder of the irrepressible power of the human spirit. In December 2001, the Apartheid Museum opened in Johannesburg. Like the Holocaust Museum in New York, to

Xhosa restaurant in Guguletu township, Cape Town.

Robben Island Museum poster at Cape Town's Waterfront complex.

which it has been compared, the Apartheid Museum ensures that South Africa's chilling history will never be forgotten.[7]

South Africa's Truth and Reconciliation Commission was also an attempt to recognize and validate the hidden past. The hundreds of stories that were told at the TRC hearings, as vital as they were to the people concerned (whether victim or perpetrator), represent only a fraction of

Statue of Steve Biko, East London, Eastern Cape.

the stories of pain and injustice that could have been told. Even if a wider time frame had been provided by the Commission to include stories of gross human rights violations from colonial times, the Commission could not have uncovered all the stories there are to tell. The stories of dispossession experienced by African children who watched their mothers nurse and care for the white children of their employers; the stories of farmers who were forced off their land to work as sharecroppers or

labourers on the lands that once were theirs; the stories of African men who left their homes and families for months at a time to work as poorly paid migrant workers in white-owned mines and industries – these represent a small part of the South African experience. Some of these stories are emerging in the land claim process, but many will never be publicly made known.

THE POWER OF STORIES (CANADA)

For too long Canada's story has focused only on the needs and interests of its dominant society. The founding narrative – the image Canadians have of themselves – tells of a mosaic of many cultures melded into one and dominated by two "founding nations," British and French. According to this founding myth, aboriginal peoples are expected to eventually adopt the languages and cultures of the dominant society and become assimilated as minority populations within Canadian society.

Political scientist Alan Cairns would like to see First Nations incorporated into the Canadian nation and given some special recognition as the first occupants of this country that would make them "Citizens Plus." He laments the fact that aboriginal and non-aboriginal communities in Canada "do not meet as common members of a single society, sharing citizenship, common memories and mutual pride in past achievements." History divides us, he argues, and it is overcoming these divisions, "at least to the extent that we can take pride in each other's presence in our common country," that is the goal towards which Canada must steadily work.[8]

The problem with this image of a blended society is that it ignores some major facts of history. The fact that Indian lands are protected under the Royal Proclamation of 1763, that treaties and agreements were negotiated with aboriginal nations by representatives of the Crown and federal and provincial governments, and that the 1982 Constitution recognizes the existing aboriginal rights of the indigenous peoples are inconvenient truths that have been largely ignored by the dominant society over the past hundred years. The onus has fallen on aboriginal people to assert their rights and to force legislators to recognize the special place of aboriginal people in Canada.

The oral histories of aboriginal people tell their own versions of Canada's history. The stories and myths of "empty lands" and "disappearing races" that supported four hundred years of dispossession are now being challenged by the proud history of aboriginal nations whose strong traditions continue to adapt to changing times. Aboriginal people are telling their stories through the various royal commissions, through

their organizations, through the court cases of residential school survivors, through land claims and negotiations for territorial rights and self-government. Each of the aboriginal groupings defined by the federal government and recognized in the Canadian Constitution, tell their own story of dispossession and broken promises. In recent years, the demands of aboriginal peoples for self-determination and economically viable territories are receiving attention from governments and from the courts.

As the Royal Commission on Aboriginal Peoples report pointed out, aboriginal Canadians are not an "inconsequential minority group with problems that need fixing and outmoded attitudes that need modernizing." They are the original occupants of the nation, many with treaties that recognized their rights; a constitution that affirms those rights and their continued cohesion as nations within Canada. They have a right to a special place in the flexible federalism that defines Canada.[9] The constitutional and legal framework now exists for the Canadian government to implement the appropriate public policy that would give aboriginal people the opportunity to be self-governing entities in Canada.

Canada's aboriginal peoples have entered the twenty-first century with new assertiveness and determination. Speaking as Grand Chief of the Assembly of First Nations at an Indigenous Peoples' Conference in 1991, Ovide Mercredi articulated the spirit of confidence that other native leaders are affirming:

> If we believe in sovereignty, then we must practice that belief and put mechanisms in place to assist others. We must develop an indigenous agency for development and not wait for others to take on what is our responsibility. The time for grieving over past injustices is over. It is time to pay attention to hurts collectively and to move forward.[10]

Establishing international connections is a vital part of a worldwide movement in aboriginal solidarity. One of the ways in which aboriginal peoples are supporting each other in reclaiming their lands and resources is through the courts.

The British case system, which is adopted by most former British colonies, has proved to be a helpful tool for indigenous peoples claiming land based on aboriginal rights. One example is the case of the Richtersveld community in South Africa which claimed rights to ancestral land (including rights to the diamond mines) based on precedents established in similar cases in Canada and Australia. The *Mabo* case in Australia was fought on similar grounds (see Appendix). Although the courts do

not always decide in the aboriginal party's favour, aboriginal plaintiffs are becoming more skilled at using the court system to their own advantage. Learning the language of the dominant society has become a necessary part of their survival strategy. For Canada's First Nations, the Constitutional recognition of existing aboriginal rights is vital to the land restitution process. It is the responsibility of the courts – in particular, the Supreme Court of Canada – to interpret what these rights entail. It is the task of governments to implement the courts' decisions and to ensure that justice is done.

Appendix
Australia and New Zealand

The pattern of British colonial dispossession and political domination in North America and southern Africa was duplicated with some variations in Australia and New Zealand. Today, a common hunger for justice and human dignity is forcing Australian Aborigines and the Māori of New Zealand onto the political arena. Without the constitutional protection enjoyed by Canada's First Nations and South Africa's black majority, the first peoples of Australia and New Zealand are relying on the justice system in their respective countries to support their demands for land and treaty rights.

Unlike Canada, South Africa and New Zealand – where prior occupancy of the local inhabitants was initially acknowledged – the colony of Australia was established on the doctrine of *terra nullius*, the belief that the land was devoid of human habitation. British settlers – so the argument went – were legally entitled to claim sovereignty and ownership over the entire continent on grounds of "first possession." When the British flag was hoisted over the penal settlement at Sydney Cove on 17 February 1788, as many as half a million Aboriginal people, living in hundreds of tribal groups across the continent, were instantly dispossessed of their ancestral lands. In the words of Australian historian, Henry Reynolds: "From that apocalyptic moment forward they were technically trespassers on Crown land even though many of them would not see a white man for another thirty, another fifty years.... English legal witchcraft was so powerful that it had wiped out all tenure, all rights to land which had been occupied for 40,000 years, for 1,600 generations and more."[1]

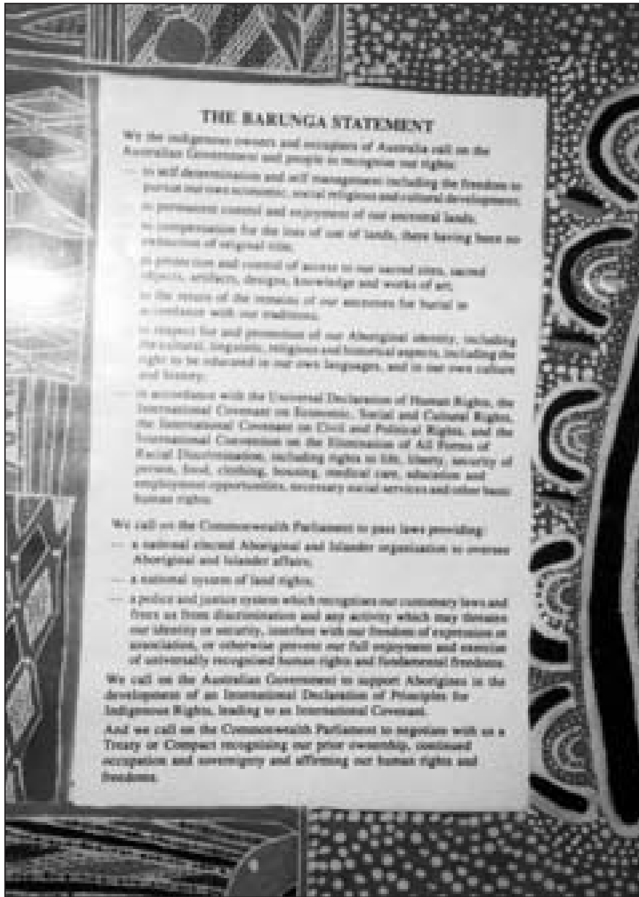
As the settlers moved further into the interior, it became obvious that the land was far from empty. Against fierce resistance, local populations were forced off their land to make way for European settlement. Many died from diseases like smallpox and syphilis, hundreds were murdered

outright. As Australian historian Clive Turnbull observes, "from early in the story of European contact with Aborigines, we came upon the two factors which most contributed to their hostility and ultimately to their destruction: the gratification of the lusts of the invaders and the greed for land."[2] The crimes committed against indigenous Tasmanians are among the ugliest in Australian history. Although the notorious "Black Line" expedition – a human chain consisting largely of soldiers, settlers and convicts – failed in its objective to rid the island of every living aboriginal man, woman and child, very few Aborigines survived the invasion of Europeans on their shores.

While clearly fallacious, the myth that the country had been settled legitimately by right of first possession remained rooted in white Australian psyche and law until well into the twentieth century. As recently as 1971, the notion of *terra nullius* was upheld by the Supreme Court of Northern Territories in its first land claim case, *Milirrpum v. Nabalco Pty Ltd*. As in Justice McEachern's 1987 ruling in Canada's *Delgamuukw* case, the Australian court deemed that the Aborigines' relationship to land did not constitute legal interest in property recognizable in Australian law. Some concessions were made, however, in 1976 when the commonwealth (federal) parliament enacted a law that allowed Aborigines in the Northern Territory to apply for grants to own land provided it was not required for mining for the "national interest." Some of the southern states subsequently followed suit.

In 1988 the aboriginal peoples of Australia presented the prime minister Bob Hawke with a Statement calling for aboriginal self-management, a national system of land rights, compensation for loss of land, respect for aboriginal identity, an end to racial discrimination and the granting of full civil, economic, social and cultural rights. The Barunga Statement, which was written on bark, was eventually hung in Parliament but the government has never responded to its demands.

It was not until 1992 that indigenous Australians made any real headway towards reclaiming the land taken from them in 1788. Ed Mabo, on behalf of the people of Murray Island, made Australian legal history when he claimed ownership of ancestral territory by virtue of native title In *Mabo v. Queensland*, the Australian High Court ruled, by a majority of six to one, that the theory of *terra nullius* was inappropriate in a country which had so clearly been occupied. It also ruled that indigenous rights to land had not been extinguished by European occupation. In Justice Brennan's words: "whether the Islanders had been colonized by settlement, cession, conquest or declaration, their title in the land had not been surrendered."[3]



THE BARUNGA STATEMENT

Barunga Statement display at the Tiagarra Aboriginal Culture Centre & Museum, Victoria, Australia.

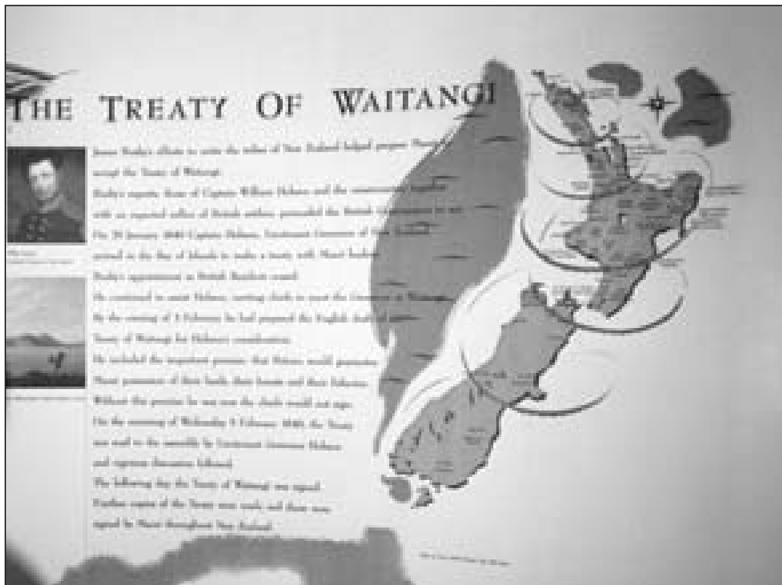
The *Mabo* decision, quickly followed by the *Wik* case, substantially changed the law of the land in Australia and brought Australian common law into line with the contemporary situation in other western nations, including Canada and New Zealand. In 1993, the Keating Government introduced the Native Title Act to deal with the implications of the *Mabo* decision. The Act set forward procedures for dealing with Native Title claims – but also retrospectively validated the interests of non-indigenous landholders. In an historic compromise, indigenous groups accepted this validation process in exchange for guaranteed rights to negotiate. In theory, these mechanisms should have made the hearing of claims more efficient. In practice, the massive level of opposition to claims by state governments and other parties, resulted in lengthy and expensive court cases. A case in point was the claim of the Yorta Yorta

nation that went into appeal in 1999. The Yorta Yorta lost their claim to their ancestral territory because they did not have written proof of their aboriginal rights. As Jacqui Katona, an Australian aboriginal writer and human rights activist, points out,

> By inventing the concept of native title to suit its own purposes, the Dominant Nation has us tied up in knots. On the one hand it acknowledges a past wrong, while at the same time it prevents Aboriginal people from reclaiming their land because they have been excluded from it in the first place. And because the court will not listen to their oral evidence, the legal system now decides that their rights over the country are "extinguished."[4]

Over the past decade, the Australian government has been looking for ways to diffuse the anger of its historically disadvantaged aboriginal communities. In 1994, the commonwealth government announced "reconciliation" as a national goal, and established a Council for Aboriginal Reconciliation to suggest strategies to address the issue of indigenous rights. Attention has been focused on the forced removal of children of Aboriginal descent from their homes between 1910 and 1960. In 1997, Australia's Human Rights and Equal Opportunities Commission held a public inquiry into what became known as the "Stolen Generations." The Inquiry considered public and confidential evidence from hundreds of Aborigines; detailed many stories of childhood abuse and its devastating effects; and made fifty-four recommendations calling for reparation to all victims. The Commission's Report heightened public sympathy for aboriginal rights in Australia and caused acute embarrassment to the Australian government prior to the Olympic Games in Sydney in 2000.[5] However, the call for compensation for the damaging effects of the policy on aboriginal communities, produced minimal response from the Howard government.[6] While Sydney's "Sorry Day" parade in May 2000 drew an estimated crowd of two hundred thousand people, the Prime Minister, John Howard, was conspicuously absent. His refusal to deliver a formal apology to the indigenous population for their treatment at the hands of white immigrants has further alienated the aboriginal community and their supporters.[7]

In New Zealand, where British navigator James Cook established relatively cordial relations with the local inhabitants on his 1769 and 1777 visits, indigenous land rights were never in question.[8] The New Zealand Polynesians, who had inhabited these islands for at least a thousand years before the arrival of Europeans in the 1790s, were formidable warriors



Treaty of Waitangi (1840) display at the Te Kapa Museum, Wellington, New Zealand.

but also highly skilled traders. The European sealers and whalers who established settlements along the coast – and later in the interior – were in no doubt that the country belonged to the Māori (as the local people now named themselves).[9] Organized colonization of New Zealand began in earnest in the late 1830s when the New Zealand Company (owned by a British family) established settlements in Wellington, Nelson and New Plymouth. When the British government decided to annex New Zealand (ostensibly to protect the local people from negative European influences, especially the introduction of the musket) it hoped to do this with Māori consent. Captain William Hobson was dispatched to the Bay of Islands in 1840 and, with the help of British Resident, James Busby and Church Missionary Society missionary Henry William, drew up a treaty by which the New Zealanders themselves would cede sovereignty of their country to the British Crown.

This single treaty, the Treaty of Waitangi (1840), has dominated Māori-state relations ever since. The fact that there were two official versions of the Treaty – one in English and one in Māori – has played a critical role in the country's history. According to the English version, both the chiefs of the United Tribes of New Zealand (established by the British Resident James Busby in 1835) and the chiefs of the independent tribes outside the Confederation "ceded their Sovereignty to Her Majesty the Queen of England." The Māori version, when translated back into

English, replaces the word "sovereignty" (*mana*) with "governorship" (*kāwanatanga*). Thus, the legal and moral validity of the Treaty hangs on the translation of the word "sovereignty."

In his paper on the centrality of the Waitangi treaty to Māori justice, New Zealand historian R.J. Walker argues that the missionaries, who had held preliminary discussions with some of the chiefs, knew that any loss of *mana* was an anathema to the chiefs. As it was, there were many who refused to sign the treaty. When the northern chiefs assembled at Waitangi on 5 February 1840, at the invitation of Governor William Hobson, many spoke against it, recognizing intuitively that their sovereignty was at stake. Chief Tareha was emphatic on this point:

> We, we are only the chiefs, the rulers. We will not be ruled over. What! Thou a foreigner up and I down. Thou high and I, Tarehu the great chief of the Nga Puhi tribes low! No, no, never, never.[10]

When Hobson arrived the following day, forty-three chiefs signed because they saw no other alternative. As each chief signed, Hobson shook their hand saying '*He iwi tahi tātou*' (We are now one people). The missionary W. Colenso had the task of giving out blankets and a parcel of tobacco to each chief.[11]

After the Treaty was signed, and the pace of systematic settlement increased, the real meaning of the Treaty revealed itself in the competition for land that ensued. In June 1843 a posse of fifty armed settlers was sent out to enforce the New Zealand Company's claim to Māori land at Warau. A new spirit of nationalism developed within the Māori community, inspired by the separatist Kotahitanga movement. In 1858 the first Māori king, Te Wherowhero was elected. The king came to symbolize *mana whenua* (sovereignty over the land) but the intention was to establish two parallel sovereignties, similar to the North American notion of the two-row wampum. However, Governor Gore Browne set out to crush the King movement on the grounds of "disloyalty to the Queen." A series of land wars ensued. To pay for the wars, three million acres of land was confiscated under the New Zealand Settlement Act of 1863. In order to gain possession of the remaining sixteen million acres still in Māori hands, the Native Land Court was established in 1867. The Court functioned to transform tribal lands from communal to individual title. Those named on the title to a block of tribal land were regarded as trustees by their people, but they had the power to sell it if they wished. Beset by "land sharks and shyster lawyers," the title holders were induced to part with their property for paltry sums. By 1960 only four million of

the original sixty-six million acres of Māori land was left in their hands. As Walker puts it, the guarantees entered into by the Crown at Waitangi were "as insubstantial as mist in the noonday sun."[12]

For all its veneer of humanitarian idealism, the colonization of New Zealand was substantially no different from any other example of nineteenth century imperialism (with the possible exception of South Africa). Hobson's "one people" objective to amalgamate the settler and indigenous population under the same political and judicial system, failed to produce more than nominal equality in economic and social life. Although Māori people had full civil rights, the government essentially represented a white settler electorate (four Māori members of parliament represented the interests of the Māori population) who were determined to maintain their dominion over the Māori and to acquire their land on terms the Europeans considered satisfactory.[13]

To some extent, the "amalgamation" policy in New Zealand meshed with Māori aspirations. Historian Alan Ward records that, in the 1960s, many Māori leaders embraced the notion of "ambiculturalism" as well as "inclusion." By "ambiculturalism" they meant not only the tolerance of cultural differences, as in "pluralism," but the recognition of the validity of the two cultures and the ability of each to make creative use of the other.[14] Unfortunately, self-interest on the part of the white community – the knowledge that giving Māori greater control over their land would hinder land purchasing – frustrated that approach. In Ward's view, had some accommodation of Māori demands been made, genuine "ambiculturalism" may have been possible.[15]

Unlike South Africa, where the African peoples were united against a common oppressor, tribal identity prevented the Maori from acting as a pressure group commensurate with their numbers. However, by focusing on the Waitangi Treaty, some measure of unity was attained. Having appealed unsuccessfully to the British government for decades, their petition to have the Treaty ratified was finally tabled in the New Zealand Parliament in 1934. Years went by and nothing happened. The decision of the Māori Affairs Committee thirteen years later to have the Treaty reprinted and copies hung in the schools, was seen by the Māori as a hollow gesture. In 1971, the annual "celebration" of the Treaty (Waitangi Day) became the focus of radical Māori protest action. In terms very like those of Canada's constitutional debate in the late 1970s, Ngā Tamatosa (The Young Warriors) proclaimed that unless the Treaty was ratified, Waitangi Day would be declared a day of mourning. The Tamatosa protest was supported by a submission to government by the Māori Council citing fourteen statutes which contravened the Treaty.

The journey to dignity and the restoration of Māori land rights has been long and painful. After more than a century of political, statutory, and judicial denial of the Waitangi Treaty, the chiefs still assert that they have never relinquished sovereignty over their land. To date the Treaty confers a moral and political (but not legal) obligation on the part of government – but it has never been ratified by Parliament and is therefore not enforceable in a court of law.

As in Australia and South Africa, "reconciliation" has become the operative word in dealing with the legacies of the past. In keeping with its previous cosmetic responses to Maori demands, the government established the Waitangi Tribunal in 1976 to hear Māori grievances. However, the measure was not retroactive to 1840. It was only authorized to deal with infractions dating from 1975, when the Treaty of Waitangi Act came into force. Despite these obstacles, Māori confidence in their own future has manifested itself in a new political assertiveness over the past two decades. The objective is to renegotiate their rights in a nation-state through the articles of the 1840 Treaty.

Notes

PREFACE

1 The Republic of South Africa will be referred to hereafter as South Africa.
2 International Defence and Aid Fund for Southern Africa (IDAF) was an anti-apartheid organization that raised funds for the legal defense of political prisoners in South Africa and humanitarian aid for their families. It was based in London, England, having been banned in South Africa by the apartheid government in 1966. IDAF, as it was known around the world, was disbanded in 1991 after the release of Nelson Mandela from prison and the unbanning of the African National Congress and other liberation movements.

INTRODUCTION

1 South Africa's total land mass is 1.23 million square kilometres and the province of Ontario covers an area of 1.08 square kilometres.
2 Rodney Davenport and Christopher Saunders, *South Africa: A Modern History*, 5th ed. (London: Macmillan, 2000), 428.
3 Before Confederation, Ontario and Quebec were known collectively as the Province of Canada. Under the terms of the British North America Act (1867) the parts of the Province of Canada formerly known as Upper Canada became Ontario and the parts formerly known as Lower Canada became Quebec.
4 In 2004, the number of Canadians reporting aboriginal ancestry was just over one million, a figure that includes 720,740 Métis (people of Euro-Aboriginal descent) and 41,800 Inuit.
5 The Afrikaans language evolved from the Dutch spoken by the first white settlers at the Cape consisting of immigrants from Holland, Germany and France. The process of creolization was also influenced by the languages spoken by slaves from Indonesia and Asia, Khoikhoi as well as people of mixed descent. While the language of officialdom remained Dutch, the new creolized form (known as "Cape Dutch") developed into a separate language by the nineteenth century. See Christopher Saunders and Nicholas Southey, *A Dictionary of South African History* (Cape Town & Johannesburg: David Philip, 1998), 4.
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20 Hugh Brody, *The Other Side of Eden: Hunters, Farmers and the Shaping of the World* (Vancouver: Douglas & McIntyre, 2000), 215.
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27 Brody, *The Other Side of Eden*, 215.
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CHAPTER ONE: THE LAND AND THE PEOPLE ß

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celebrated case, the Transvaal Supreme Court found that the law did permit Africans to register land in their own names. For details about the Tsewu case see Donald Denoon, *A Grand Illusion: The Failure of Imperial Policy in the Transvaal Colony during the Period of Reconstruction 1900–1905* (London: Longman, 1973), 120.

24 Aborigines' Protection Society, "The Native Policy of the Dutch Boers," 4.

25 George McCall Theal, *History of South Africa from 1873 to 1884: Twelve Eventful Years*. Vol.10 (London: Allen & Unwin, 1919), 143–44.

26 The myth of the "empty land," that Bantu-speaking peoples arrived as immigrants on the lands north of the Vaal River at about the same time as the Europeans first settled in Table Bay, was finally exposed by historians in the 1970s. See Davenport, *South Africa*, 7.

27 Historian Julian Cobbing questions the entire notion of the Mfecane and argues that the motor for the disruptions (where they occurred) are to be found within white colonial society and the need for labour to ensure its continued commercial success. See Saunders and Southey, *A Dictionary of South African History*, 112.

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CHAPTER THREE: SOVEREIGNTY AND SEGREGATION ß

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27 Section 2 of the Alexander Bay Development Corporation Act 46 of 1989 established Alexkor as a corporate body and provided for the transfer to it of all assets, liabilities, rights and obligations of the state in the State Alluvial Diggings which the Minister (of Economic Affairs) with the concurrence of the Minister of Finance may determine. See Land Claims Court, Case Number LCC 151/98. Summary of the Plaintiffs Submission, 57.

28 The sixth plaintiff is listed as "The Adult Members of the Richtersveld Community." It was agreed between the parties that the persons on the list are inhabitants of the Richtersveld Reserve. The list was up-dated to reflect the changes which occurred in the community since its original submission due to deaths, people moving in or out, or children growing up and becoming adult members of the community. See ibid., 3.

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33 Ibid., 25.
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35 The plaintiffs claimed ownership of the subject land by virtue of the fact that the Common Law of the Cape colony when the Richtersveld was annexed in 1847 was Roman Dutch Law. Under Roman Dutch Law, the ownership of *terra nullius* can be acquired by *occupatio*. The land claimed by the Richtersveld community was *terra nullius* in the sense that nobody owned it, and thus they acquired ownership of the land by right of occupation. See Land Claims Court. LCC 151/98, 32.
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7 Feature article, "Museum Offers Chilling Trip into Belly of Apartheid," *Business Day*, Johannesburg, 6 December 2001.
8 Cairns, *Citizens Plus*, 86.
9 RCAP. *People to People*, 126.
10 Ovide Mercredi was speaking at an Indigenous Peoples' Conference "Strengthening the Spirit: Beyond 500 Years" held in Ottawa in November 1991.

APPENDIX: AUSTRALIA AND NEW ZEALAND

1 Reynolds, *The Law of the Land*, 8.
2 Clive Turnbull, *Black War: The Extermination of the Tasmanian Aborigines* (Melbourne and London: F.W. Cheshire, 1948), 8.
3 *Mabo and Others v. Queensland* (*No. 2*) (*1992*) 175 C.L.R. IFC 92/014.
4 Jacqui Katona, "Hylus Marcus Memorial Lecture," delivered in Melbourne, Australia, 1999, 9. *Author's note: Katona, a Mirrar woman born in New South Wales, worked on Australia's Royal Commission into Aboriginal Deaths in Custody and as a "stolen generation" researcher before taking on the work of communicating the Mirrar story to the international community*.
5 The Human Rights and Equal Opportunities Commission of Inquiry report, "Bringing them Home: Report of a National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families" was published in 2000.
6 Senator John Herron, Australia's Aboriginal Affairs minister, raised a public outcry by questioning the accuracy of the term "stolen generations" (and thus the legitimacy of the project) in his report to a Senate Committee. See Tony Wright and Kerry Taylor. "Fury over 'stolen' denial" *The Age*, Melbourne, Australia, 3 April 2000, 14.
7 Michael Gordon, "Another blow to process of healing," *The Age*, Melbourne, Australia, 3 April 2000, 9.
8 Apart from incidents involving shooting, kidnapping and thefts, Cook acted at most times with restraint and common sense during his three visits to New Zealand (which he apparently failed to do in Hawaii where he met his death in 1779). See Michael King, *One Thousand Years of Maori History: Nga iwi o te motu* (Aukland: Reed Books, 1997), 25.
9 As Michael King explains it, paradoxically there were no Maori in New Zealand before there were Europeans. New Zealand Polynesians did not begin to use this name for themselves until 1840. "Maori" means "normal" or "usual;" as in "tangata Maori," an ordinary man. There was no need to distinguish such ordinary people from others until the land was shared by others. See ibid., 10.
10 Cited in R. J. Walker, "The Treaty of Waitangi as the Focus of Māori Protest," in Kawhuru, ed., *Waitangi*, 266.

11 Ibid., 269.
12 Ibid., 272.
13 Allan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (Canberra: Australian National University Press, 1974), 308–9.
14 Ibid., 310.
15 Ibid., 312–14.

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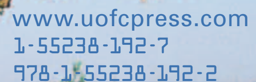
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