Breaching the Guilt Taboo

Comparing Australian and Canadian initiatives, policies and approaches concerning their indigenous populations, from a reconciliation perspective

Master Thesis – 20 August 2012 – H.J.M. Verheijke – Student no. 3150461 – Utrecht University –Master International Relations in Historical Perspective – Supervisor P.A.M. Malcontent

Master Thesis

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I told those dedicated workers for peace and reconciliation that they should not be tempted to give up on their crucial work because of the frustrations of seemingly not making any significant progress, that in our experience nothing was wasted, for when the time was right it would all come together and, looking back, people would realize what a critical contribution they had made. They were part of the cosmic movement toward unity, towards reconciliation, that has existed from the beginning of time.

Archbishop Desmond Tutu, 1998

Introduction

August 9 marks the International Day of the World's Indigenous peoples. Estimations provide that the current number of indigenous peoples worldwide exceeds 370 million, living in over 70 countries.[1] While this number is substantial, the existence of nearly every one of these groups of indigenous peoples has been jeopardized by settler colonialism at one point or another. When, during the 1960s, the global movement of decolonization took flight, this gave rise to the liberation of most of the world's population formerly dominated by western imperialism. Settler colonialism however, entailing nation-states which have arisen predominantly from immigrants and their descendants and in which the indigenous population has generally become a displaced minority, could not be reversed.

In several countries, settler colonialism has instigated a significant transformation in which the country and its people 'form a new reality in which the indigenous people form only a small minority and were on the verge of extinction.'[2] This statement is valid for both Australia as Canada, the two nation-states this thesis will draw a comparison between.

Both Australia and Canada are considered to be well developed, prospering countries with liberal-democratic regimes which offer equal opportunities to all their inhabitants, backed by a multicultural society. Concurrently there is another factor which is similar in these two countries: they have emerged out of settler colonialism, while simultaneously serving as the homeland of several distinct indigenous groups: the Aborigines in Australia, and the First Nations, Inuit and Métis in Canada.[3] Occasionally

Although with regard to the majority of the population the indigenous peoples in Australia and Canada form merely a small minority, the numbers are still significant: in Canada approximately

[1] See: United Nations Permanent Forum on Indigenous Issues, online available via: http://social.un.org/index/IndigenousPeoples.aspx

[2] E. Barkan, (2000), *The Guilt of Nations: Restitution and Negotiating Historical Injustice,* (Baltimore, 2000), pp. 159-160.

[3] Note on terminology: This thesis follows the international convention of referring to the first peoples of a territory as indigenous peoples. However, under Canadian law, the term Aboriginal is used to refer to the indigenous peoples of Canada. Therefore, in quotations the term Aboriginal will frequently be used to indicate Canada's indigenous peoples as well.

4.4% of the overall population is of indigenous decent, in Australia approximately 2% of the overall population.[4] In both Australia and Canada, settler colonialism has led to a strained relationship between the indigenous and non-indigenous population to this day.

Taking a closer look at the living standards of most of the indigenous peoples in these two countries makes the irony of the situation painfully clear: the wealth and thriving prospects of the nation-states they live in have been acquired by taking land and resources from these indigenous peoples, who now suffer extreme poverty, both in socioeconomic, physical as cultural aspect. In addition, over the years numerous policies have been implemented in order to 'deal' with these indigenous inhabitants, which, in hindsight, have merely deteriorated indigenous peoples' situation.

Certainly, this is a valid analysis for most settler societies. However, the main reason this thesis focuses on Australia and Canada is, besides other similarities, the set of policies, similar in both countries, which ordered the removal of indigenous children from their families and thus led to the Stolen Generations. Many indigenous people in Australia and Canada still suffer traumas as a result of these policies, and the policies are currently acknowledged for having caused major injustice to indigenous people in Australia and Canada.

Although at present inequalities in both countries remain, over the past decades awareness of the rights of indigenous peoples has grown. This movement started in the 1960s with a growing recognition of these rights. During the eighties and nineties these rights started being negotiated, mostly through the discussion of property (land) rights. However, although awareness for indigenous peoples' situation has grown, in practice matters have not changed significantly. Literature on transitional justice poses in this regard that some form of justice is required in order to redeem the guilt created in the past.[5]

However, transitional justice for indigenous people in the context of settler colonialism presents a difficult challenge. Since generally there is no clear moment of rupture, no clear break with the past, significant transformation of political frameworks and structures of inequality are less likely to occur than in case of, for instance, the downfall of a regime.[6] Furthermore, the long history of injustice and the elusiveness of the intention of policies implemented in the past contribute to the inability of determining a perpetrator and punishable crime. Justice in the retributive sense of the

[4] J. Corntassel and C. Holder, (2008), "Who's sorry now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru", in: *Human Rights Review,* DOI 10.1007/s12142-008-0065-3, (2008), p. 2.

[5] A. Woolford, (forthcoming 2012), "Governing Through Repair: Transitional Justice and Indigenous Peoples in Canada", in: P. Malcontent (ed.) *Facing the Past: Finding Remedies for Grave Historical Injustice*. Antwerp, Belgium: Intersentia Publishers, p. 1

[6] Ibid.

word – which requires some form of punishment for the perpetrators[7] – will therefore most likely not be achieved. A more realistic goal therefore would be for indigenous peoples and the governments of the nation-states they live in to seek reconciliation through means of restorative justice, such as compensation, restitution and symbolic atonement. Restorative justice furthermore distinguishes itself from retributive justice by focusing on healing, and by the fact that it requires victims and victimizers to cooperate and to seek ways that unburden all parties.[8]

This process moreover needs to be channeled through the entire community. When this is not done properly, popular (mis)-perception of mainstream society concerning indigenous peoples can severely complicate the government's process of implementing measures, funding or policies which benefit the indigenous population. Namely, because the respective indigenous populations in Australia and Canada make up such a minor percentage of the total population of the nations, popular societal opinion can by and large determine their governmental faith. It may not come as a surprise that in times of global financial crisis extensive funding for indigenous initiatives or policies is not a priority for the majority of the population.

Nor in Australia, nor in Canada has such a process of transformation thus far successfully occurred. Yet, numerous of policies, initiatives and steps have been taken by consecutive Australian and Canadian governments, aimed at bridging the divide between indigenous and non-indigenous peoples. Although similarities herein can be distinguished, implementation differs per nation-state. It is relevant, therefore, to assess which of the approaches and policies initiated in the two nation-states have been most successful in generating reconciliation. Generally, it is assumed that Canada is more advanced than Australia in this aspect, since the Canadian government is considered to be more forbearing in returning lands and granting self-governance to certain indigenous groups than Australia. There are several publications which underline this assumption, such as "Nunavut: Inuit regain Control of their Lands and their Lives" by Dahl, Hicks and Jull (2000), and "Governing Through Repair: Historical Injustices and Indigenous Peoples in Canada" by Andrew Woolford (2012). Furthermore, as Woolford points out, the Canadian Federal government has irrefutably taken more significant steps than Australia in compensating the victims of the Stolen Generations and healing the historical injustices of the residential schooling.[9]

Nevertheless, the fact that the Canadian government has taken more significant steps with regard to compensation and reparations does not necessarily mean that this has simultaneously resulted in generating reconciliation. To what extent such initiatives have truly benefited the

[7] See: D. Taylor, "Beyond the Courtroom: The Objectives and Experience of International Trials at the Grassroots", in: *Facing the Past: Instruments of Retribution*
[8] J. Braithwaite, (2004). "Restorative Justice and De-Professionalization". In: *The Good Society* **13** (1), pp. 28–31.
[9] A. Woolford, *Governing Through Repair,* p. 14-21.

indigenous population and have thus generated reconciliation, are some of the questions this paper will try to answer. Hence, in assessing the policies and measures of restorative justice which have been attempted in both the nation-states, this paper will attempt to establish which initiatives and approaches appear to work best in overcoming the strained relationship between the countries' indigenous and non-indigenous population, as well as the strained relationship between the indigenous peoples and the government, and what lessons can be drawn in this regard by comparing the two countries. Therefore, the main question this paper will assess is the following: **To what extent can Australia and Canada benefit from each other's experiences with regard to achieving reconciliation with their indigenous populations?**

In attempting to provide an answer to this question, this paper will answer three related questions: **Can one distinguish significant differences in the approaches and initiatives which have been attempted in Australia and Canada and if so, what are the differences?**

To what extent have Australian and Canadian approaches actually generated reconciliation with their indigenous populations?

To what extent can both countries benefit from each other's best experiences, taking into consideration not only the similarities between the nation-states, but also the differences such as geopolitical factors?

In order to assess the concept of reconciliation with regard to Australia and Canada, it is necessary to first establish what reconciliation actually is. Reconciliation is generally assumed to occur on three levels: the interpersonal level, i.e. between individuals; the societal level, sometimes referred to as community or societal reconciliation; and the broader political level, i.e. between opposing nations and between opposing parties or groups within nations.[10] It is this third level, the broader political level, which is of relevance for this thesis. The general consensus is furthermore that societies which undergo a transition from a period of war, conflict and/or political repression toward a more harmonious future in which human rights are valued, governance is responsible and considered legitimate by all and justice and human security are respected, a process of reconciliation is needed. In this regard reconciliation is viewed as an important factor for preventing new outbursts of violence and conflict, and is often seen as the end product of transitional justice.[11]

[10] O. Ramsbothan, T. Woodhouse and H. Miall, (2005), *Contemporary Conflict Resolution*, (Polity Press, Cambridge, 2005), p. 231-232.

[11] See works of Louis Bickford, 'Transitional Justice', An entry in *Macmillan Encyclopedia of Genocide and Crimes Against Humanity*, Vol.3, (2004) , pp. 1045-1047.; Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol.1 (Washington DC, United States Institute of Peace Press, 1995); Ruti G.Teitel, *Transitional Justice*, (Oxford University Press, 2000); and A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies*, (Notre Dame & London, University of Notre Dame Press, 1997).

But what then, defines reconciliation? The Oxford Dictionary defines 'to reconcile' as 'to restore friendly relations', 'to make someone accept', or 'to make consistent with another'.[12] With regard to both Australia as Canada, all three of these meanings apply. Although there can be no such thing as restoring friendly relations, since those never existed, an essential part of reconciliation in Australia and Canada is creating a harmonious relationship between indigenous and non-indigenous people. Moreover, it is important that both the indigenous population as the non-indigenous population comes to terms with the past, and accepts the history they share, in order to move toward a more prosperous and harmonious future. Lastly, none of the above mentioned goals and meanings of reconciliation can be achieved without the third meaning of the concept reconciling: making the needs and rights of indigenous population consistent with those of the non-indigenous population and the sovereign state.

As the dictionary, literature on transitional justice and reconciliation processes does not provide one clear theory or universal understanding of the concept. James Gibson argues on this matter that 'such a theory is generally not likely to emerge, because reconciliation is a syndrome of attitudes, not a discrete value'.[13] This lack of consensus among scholars and practitioners about the definition and meaning of reconciliation has led to several definitions in the literature on transitional justice. The following paragraphs will assess some definitions and meanings of the concept by several authors, with an emphasis on reconciliation between indigenous peoples and the settler societies they live in.

Firstly, John Paul Lederach states that 'reconciliation is the process and the condition where peace, truth, mercy (or forgiveness) and justice meet.'[14] He explains this unison of concepts as follows:

> Truth is the longing for acknowledgement of wrong and the validation of painful loss and experience, but it is coupled with Mercy, which articulates the need for acceptance, letting go, and a new beginning. Justice represents the search for individual and group rights, for social restructuring, and for restitution, but is linked with Peace, which underscores the need for interdependence, well-being and security.[15]

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[12] Oxford Dictionary, online available via: http://oxforddictionaries.com/definition/english/reconcile
[13] J.L. Gibson, (2004), *Overcoming Apartheid: Can Truth Reconcile A Divided Nation?* (New York: Russell Sage Foundation, 2004), p. 338.
[14] J.P. Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, (United States Institute of Peace Press, Washington D.C., 1997), p. 29.
[15] Ibid.

Thus, according to Lederach, in order to achieve reconciliation all four of these aspects need to be addressed.

Similar to Lederach's views, Louis Kriesberg puts emphasis on four 'dimensions' of reconciliation: 'truth, justice, respect and security'. He furthermore states that the term reconciliation is generally given to the process of establishing a joint conciliatory understanding between enemies or formerly opposed groups: 'It often refers to the process of moving toward a relatively cooperative and amicable relationship, typically established after a rupture in relations involving extreme injury to one or more sides in the relationship.'[16]

As Lederach and Kriesberg, Ramsbothan et al. distinguish four stages which should in unison establish reconciliation. According to Ramsbothan et al., the first of these stages, or rather, the first requirement for a reconciliation process to commence, is to provide some form of political closure. The second stage comprises overcoming polarization, by means of 'reconciling stories', or rather contending the often irreconcilable accounts of the conflict. The third stage consists of 'managing contradiction and reconciling conflicting demands' which should include the transformation of political structures. The last stage of reconciliation according Ramsbothan et al., centers on the celebration of differences and the reconciliation of former enemies.[17]

Additionally, Rigby argues that reconciliation in its deepest sense can only be achieved when the structures and framework of the past, in which the violence, inequality and exclusion occurred, are addressed. He poses in this regard that people can only begin to move toward a shared, harmonious future when a sustained effort is made to transform these structures which embody the former divide between the two groups. He emphasizes the sustainability of such a transformation:

> Only when people feel that the evils of the past will not return, when they believe that "things are moving in the right direction", will they be in a position to loosen the bonds of the past, relinquish the impulse for revenge and orient towards the future. In other words, reconciliation needs to be grounded in a sustained effort at restitution and "putting things right".[18]

According to all three of these authors, reconciliation implies a process in which the perpetrators as well as the victims cooperate to come to terms with the past, and move forward to a

[16] L. Kriesberg, (2007), "Reconciliation: Aspects, Growth and Sequences" in: *International Journal of Peace Studies,* Vol. 12, No. 1, Spring/Summer 2007, p. 3
[17] Ramsbothan et al., *Contemorary Conflict Resolution,* p. 243.
[18] A. Rigby, (2000) *Forgiving the Past: Paths toward a culture of reconciliation*, Centre for the Study of Forgiveness and Reconciliation, Coventry University, UK., p. 15.

future in which the two parties can coexist harmoniously. Following the definitions of Lederach, Kriesberg and Ramsbothan et al., this process contains multiple dimensions, in which several concepts are of importance: justice, truth, forgiveness, respect, and the transformation of the (political) framework and/or structures that enabled and upheld the divide.

In assessing the ten year-long reconciliation process in Australia from 1991 to 2001, Andrew Gunstone furthermore defines reconciliation as 'a process that should address symbolic, practical and substantive issues.' According to Gunstone, sovereignty, the making of treaties, power relationships and indigenous rights are some of the substantive issues; practical issues include the altering of socioeconomic conditions and living standards of the victimized group. Symbolic issues, lastly, can include the offering of apologies, the returning of ancestral grounds, bones or artifacts and the acknowledgement of suffering caused by the victimizers.[19] In addition, he argues that the historical as well as the contemporary relationship between indigenous and non-indigenous people ensures that conflicts of interests and differences will continue to exist. This should be acknowledged and accommodated rather than 'be obscured through a nationalist framework.'[20] This is consistent with stage four of a reconciliation process according to Ramsbothan et al.: accepting and celebrating differences.[21]

With regard to Canada, Carole Blackburn explores in her article two meanings of reconciliation. She states that firstly, reconciliation should entail correcting mistakes made and harm done in the past as well as creating a new relationship between indigenous and non-indigenous people. Secondly, reconciliation should mean reconciling the constitutionally protected aboriginal rights with Canadian sovereignty and the values of the non-aboriginal society. Therefore, according to Blackburn, reconciliation should hold both a sense of political legitimation (of the dominant state system) as well as a sense of making incompatible rights and needs compatible.[22]

Nevertheless, as stated before, achieving reconciliation in settler-societies between the indigenous and non-indigenous people is troublesome because there is no clear break with the past. Moreover, because the injustice dates back so far that most of the current non-indigenous population does not feel as though they are still the victimizers and thus need to "put things right". Still, the traumas of past policies continue into the present and are generally being addressed with more government policies and funds aiming to "fix" past injustice. Although history shows that all these government policies generally have done is to deteriorate the situation, the respective

[19] A. Gunstone, (2007), *Unfinished Business: The Australian Formal Reconciliation Process,* (Australian Scholarly Publishing, North Melbourne, 2007), pp. 4-5.
[20] Ibid*.,* pp. 4-5.
[21] Ibid., p. 34
[22] C. Blackburn, (2007), "Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada", in: *Journal of the Royal Anthropological Institute*, Vol. 13, Iss. 3, 1 September 2007, pp. 621-639., p. 1.

governments maintain the view that the government should "overcome" this "problem". This most likely springs from a deep-rooted belief that the 'western ways' are the only way, but it might also be caused by the guilt which is intrinsically linked to the nation-stated they govern.

Most of the literature on reconciliation in Australia and Canada nevertheless focuses on government initiatives to 'close the gap' and 'bridge the divide' and although this irrefutably needs to be done, this thesis argues that the approach to do so needs to be designed by both indigenous and non-indigenous in order to reach reconciliation. Peter Sutton argues on this matter that this view of reconciliation which requires government action to provide closure and thus reconciliation, 'suggests that reconciliation is something the non-indigenous have to do, while the indigenous sit back gratefully silent, or merely nod their acceptance, or just don't want to hear'.[23] Surely, that is not reconciliation. Literature on reconciliation argues for a cooperative approach and the making consistent of opposing stories, beliefs and interests, and thereby implies that reconciliation is a process in which both parties should contribute to achieve it. This is echoed by Braithwait's definition of restorative justice which, according to his view, can only work to achieve reconciliation if it unburdens **all** parties, hence, both victims and victimizers.[24] To be more specific, when applied to Australia and Canada this entails that both indigenous as non-indigenous should contribute, but also that both parties should forgive and thus be released from the burdens of the past: the indigenous population from a history of injustice and suffering, and the non-indigenous population from a history of guilt. For this to happen however, a paradigm shift is necessary, in which cooperation between both parties becomes standard, instead of exception.

Structure and methodology

Thus, extracting from the literature used, this thesis will apply the notion that reconciliation entails a process, in which truth, justice, security, forgiveness and structural changes are key elements. In order to assess these elements, and thereby assess to what extent certain initiatives have been contributive to reconciliation, indigenous views and perspectives are of crucial importance. However, there seems to be a hiatus of scholarly indigenous views in literature on this matter. Several factors could be the cause of this hiatus, the first being the overall low education levels of the majority of the indigenous population of both countries. A second factor might be the apathy of many indigenous peoples, as pointed out by Peter Sutton,[25] which is maintained by the vicious circle of lack

[23] P. Sutton, (2010), *The politics of Suffering: Indigenous Australia and the End of the Liberal Consensus*, (Melbourne University Press, 2009) p. 195.
[24] J. Braithwaite, *Restorative Justice and De-Professionalization*, pp. 28-31.
[25] P. Sutton, *The Politics of Suffering*, pp. 57-60.

of education and searing socioeconomic conditions of most indigenous people. Nevertheless, indigenous views are, as argued, of crucial importance for the relevance of this thesis. In some parts of this thesis the indigenous perspective is therefore derived from indigenous online forums or other websites.

Furthermore, the key elements which in unison can establish reconciliation are still fairly abstract and thus very difficult to measure. To enhance measurability, this thesis will, in addition to the indigenous perspective, apply the division Gunstone distinguishes:

- Symbolic reconciliation, which can be linked to the factors truth and forgiveness, and can be measured by the extent and legitimacy of mechanisms of restorative justice such as official apologies and financial compensation
- Practical reconciliation, which can be linked to justice and security, and can be measured by improving socioeconomic conditions
- Substantive reconciliation, which entails structural changes to ensure the sustainability of the transformation, and can be measured by granted land rights, treaties and self-determination.

This thesis nevertheless argues that reconciliation in its highest sense can only be achieved when all three of these elements are addressed. Reconciliation, furthermore, especially when a settler society is concerned, should be process to which both parties actively contribute, and which should be acknowledged nation-wide.

Although the historical background of the two nation-states appears to be very similar, it is of importance for this thesis to examine the extent of the similarities, since any differences can influence the effects of certain initiatives implemented in a later stadium. If, for example, the political or social context is different in the one nation-state, the effects of a similar initiative implemented in both nation-states will most likely vary as well. Therefore, the first chapter of this thesis will briefly assess the history of the colonial settlement and the policies concerning the indigenous populations following the settlement, as well as the current socioeconomic situation and indigenous living standards in comparison to those of the non-indigenous population.

Chapter two will encompass several policies, approaches and forms of restorative justice initiated by the respective governments, aimed at bridging the divide between indigenous and non-indigenous. The chapter will concurrently discuss to what extent these approaches have been contributive to achieving reconciliation. Chapter three will elaborate on initiated attempts by means of two case studies, the creation of Nunavut in Canada and the Northern Territory Emergency Response in Australia, and will furthermore discuss which one of these two initiatives has been more contributive to the reconciliation process, based on the criteria established earlier in this introduction. In doing so the chapter will emphasize the political and social context of Australia and

Canada and will thereby attempt to answer the question what lessons both nation-states can draw from each other's best experiences.

Relevance

It seems that the governments of the nation-states concerned are struggling with the guilt which is intrinsically linked to the history of their nation-states, inflicted by harm done in the past to their indigenous populations. Due to this guilt and the taboo that seems to surround this issue, governments seem reluctant to share opinions and initiatives concerning the divide between their indigenous and non-indigenous population. This is regrettable, since the commonalities between the situations in both countries present good ground for a comparative analysis of which both countries could benefit.

Stephen Cornell has made a relevant contribution to this debate in comparing policies of the Australian and Canadian governments to overcome indigenous poverty. In doing so, he focuses on the socio-economic situation of indigenous peoples and how to overcome the poverty they suffer. He does not however offer any insight on how this will affect reconciliation between the indigenous and non-indigenous population and/or reconciliation between indigenous peoples and the state. Andrew Armitage draws a comparison between assimilation policies in Canada and Australia in his *Comparing the policy of Aborginal assimilation*. Although this book provides relevant information for the research of this paper, it merely touches upon the government policies specifically aimed at assimilation. It thereby does not offer any insights on alternatives, such as initiatives from the indigenous population itself and approaches concerning self-government and self-determination for indigenous peoples. Furthermore, although some of the assimilation policies may have been instilled by the government as a form of reparation, this has almost certainly not been the primary motivation. His focus, therefore, is not on reconciliation and how best to achieve this. Instead, he provides a descriptive, historical account of which assimilation policies have been implemented by the government in the past.

In addition, Andrew Gunstone demonstrates in his book the goals, motivations, successes and failures of Australia´s formal reconciliation process which was initiated by the government in 1992. Carole Blackburn's article on the reconciliation process in Canada, in which she critically analyzes a Treaty with one specific group of indigenous peoples, provides relevant information for a comparison between both the formal reconciliation processes. Moreover, there are many authors who discuss policies used to achieve reconciliation, or pose new initiatives their selves, but they only discuss the situation in either Australia or Canada.

However, it is not solely the government policies that need to be analyzed. In the past few decades a valuable and necessary contribution to the debate has been provided in articles written from the perspective of the indigenous peoples. Leo van der Vlist for example has bundled the work of indigenous speakers at the *Voices of the Earth Congress* in 1993, at which indigenous people from all over the globe discussed the value of self-determination and how this should be put into practice. Moreover, authors such as Jane Robbins, Jeff Corntassel and Chaw-win-is T'lakwadzi have written about indigenous initiatives, which stress the importance of autonomy, self-government and self-determination for indigenous peoples, especially in overcoming the socio-economic disadvantages, in ridding the indigenous people of the paternalistic 'care' of the nation-state and ultimately in reaching reconciliation. Thus, an analysis of initiatives of self-determination in Australia and Canada could greatly enhance the relevance of the debate concerning reconciliation as well. Furthermore, the opinions and initiatives from the indigenous population are of crucial importance for this paper, since it is impossible to establish whether a certain degree of reconciliation has been achieved without the views of the indigenous peoples.

With regard to the case study of Nunavut in Canada, and more broadly the land rights movement of Canada's Inuit population, the views of Jens Dahl, Jack Higgs and Peter Jull have proven highly valuable. In their book *Nunavut: Inuit regain their lands and their lives* they describe the history of the land rights movement in Canada and attempt to refute arguments of those who opposed the Nunavut initiative. Subsequently, for the case study of Australia, centering on the Northern Territory Emergency Response (NTER), one of the best known books opposing the NTER is *Coercive Reconciliation*, edited by Jon Altman and Melinda Hicks. It comprises of a collection of articles of several scholars and academics, prominent Aboriginal leaders as well as social commentators voicing strong concerns with regard to this controversial move. Contrasting with their views are the ideas of Peter Sutton, a leading Australian anthropologist who has worked with Aboriginal people since 1969, who does not support the NTER per se, but who does provide a series of original insights in the contemporary history prior to the NTER as well as more broadly on reconciliation and indigenous politics. Diane Austin-Brooks, lastly, offers an insight on the more general debate regarding cultural difference and inequality, and her perception of the NTER from this angle.

To conclude, even though comparisons between Australia and Canada have been made, none of these have been made with the focus of reconciliation. This seems remarkable, since both nation-states deal with similar issues and concerns with regard to their indigenous population, embedded in a shared history of colonial settlement. The abstract character of the concept of reconciliation however, presents a complex focus for analytical research. Yet, reconciliation can be

viewed, in my opinion, as the “ultimate goal” of transitional justice, and it is herein that the importance of this comparison lies. This paper thus aims to bridge the gap in literature on Australia and Canada, in providing an analyzed overview of the most relevant experiences of both governments and indigenous populations on the path toward reconciliation.

Lastly, although a substantial amount has been written on the suffering and the rights of indigenous peoples, one must realize in assessing these issues that the awareness of the problem and the causes of it are still fairly new. The assimilation policy that led to the Stolen Generations in Australia for example, has been carried out until the late 1970s. It was not until the 1990s that people began to realize the lasting effects of the policy and the scope of the trauma inflicted upon the indigenous society. In this respect, it is important to bear in mind that reconciliation cannot be established instantly. Instead, it is a process that may take several decades – especially with regard to settler societies and their indigenous inhabitants. As the abstractness of the concept of reconciliation, the fact that reconciliation entails a long-term process affects the difficulty in assessing recent initiatives. However, since reconciliation is of such vital importance for societies to become harmonious and for suffering and guilt to end, it is of crucial importance that the concept continues to be discussed and analyzed, and, as the quote by Desmond Tutu at the start of this introduction indicated, that communities, governments and societies never stop trying to achieve this “ultimate goal” of reconciliation.

Governments of nation-states arisen out of settler colonialism, as well as the indigenous peoples who inhabit these nation-states, struggle to come to terms with the past and to find a model for coexistence that suits all parties in the present and future. Hence, establishing whether certain initiatives could be effective in achieving reconciliation in both Australia and Canada could also prove relevant for other nation-states that cope with indigenous minority groups.

The happiest future for the Indian Race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition.

Duncan Campbell Scott, 1914[26]

In the creation of any new society, there are winners and losers. So it was with Australia when it grew from a colonial outpost to an affluent society.

Richard Broome, *Aboriginal Australians*, 1982[27]

1. Historical background: two settler colonies and their assimilation policies

How can one account for similar patterns of interaction between indigenous and non-indigenous peoples, as well as current commonalities in two countries with different histories, different geographic areas and different peoples?

1.1 When did the settlers arrive?

In order to assess the similarities and differences between the settler colonies of Australia and Canada, it is necessary to establish when the settlement began, when the interaction with indigenous populations began and how these interactions occurred. Therefore, the following paragraphs will shortly discuss the period of first settlement for both Australia and Canada.

1.1.1 Australia

Captain James Cook, the British explorer who claimed Australia as British territory, reached the eastern shore of the continent in 1770. Although in his journals Cook made a commentary about having allegedly seen people on the Australian shore, Barkan suggests Cook was the first to declare Australia *terra nullius.*[28] The *terra nullius* doctrine comprised of the idea that Australia was a no man's land, populated and owned by no one, and this quickly became the official doctrine in the British Empire. The first encounter between British settlers and indigenous Australians thereafter occurred in 1788, with the arrival of the *first fleet*.

The distinction between the colonization of countries prior to this moment and the colonization of Australia is imbedded in the motivation of the colonizers' actions. Whereas North and South America for example were colonized in order to benefit from the countries' resources,

[26] In: D. Neu and R. Therrien, (2003) *Accounting for Genocide: Canada's Bureaucratic Assault on Aboriginal People*, (Fernwood Publishing, Canada, 2003).
[27] In: R. Broome, (2010), *Aboriginal Australians: A History since 1788*, 4th ed., (Allen & Unwin, Australia, 1982).
[28] E. Barkan, *The Guilt of Nations,* p. 232.

Australia was colonized primarily to find a place to dispose of some of Britain's excess population.[29] According to Richard Perry, the English population had grown rapidly in the previous century, and the increasing demand for jobs had led many into the criminal circuit. Despite the many death penalties issued, prisons were overflowing. Hence, a sustainable solution was found in the sending of convicts to the Crown's colonies to work. When the American colonies were lost during the American war of Independence, Australia became the obvious destination.[30]

When the settlers first arrived, encounters with Australia´s indigenous population were scarce. After initial curiosity and bewilderment about the arrival of the settlers died down, the Aborigines mostly minded their own business, as did the settlers once they had established the Aborigines were essentially harmless and mainly irrelevant for the settlers. It seemed the original inhabitants had little apparent resources that would interest neither the colony nor the British crown, and workforce was supplied by the convicts.[31]

Soon enough however, the colony started to expand, forcing the settlers to seek new lands and territories in the South. In addition, English agriculture proved to be very difficult in the Australian soil and climate; hence the settlers were frequently hard-pressed for food and started hunting the plentiful kangaroo population. However, the settlers lacked the indigenous peoples' regard for the local ecology, resulting in a rapid depletion of local regions which had been sufficient for the indigenous population for thousands of years.[32] The expansion to new territory, as well as the ongoing quest for food, inevitably led to more and more violent encounters between settlers and indigenous peoples.

As the settlers increased in numbers and took over more and more territory, Aborigines were occasionally employed as periodic laborers. Although these labor agreements were relatively harmonious, the increasing contact between indigenous and non-indigenous peoples introduced new diseases to the Aborigines. Moreover, ranchers depending on Aboriginal labor force started using coercion to bring them in. In addition, when ranchers' livestock did not naturally oust indigenous peoples' game, the ranchers sometimes killed of the kangaroos and wallabies in order to make way for their livestock. When indigenous people, in desperate need for food, in turn started hunting the rancher's livestock, settlers started "punitive expeditions" which sometimes wound up in the slaughter of entire Aboriginal camps.[33] The growth of resistance from the indigenous population against the settlers, combined with the growing boldness of these settlers, marked the watershed

[29] R. Perry, (1996), *From Time Immemorial: Indigenous People and State Systems*, (University of Texas Press, Austin, 1996), p. 161.
[30] Ibid., p. 162.
[31] Ibid., p. 163.
[32] Ibid., p. 166-167.
[33] Ibid., p. 168-169.

which unchained limitless violence against the indigenous people, resulting in the extinction of close to the entire Aboriginal population.

Prior to the European settlement, indigenous peoples had inhabited the Australian continent for several thousands of years. Scholars agree that the period of indigenous inhabitance extends back beyond 50.000 years. Ancient rock art sites show this period might even date back as far as 140.000 years ago. Whether the exact timescale is closer to 50.000 or 140.000 years, it is unequivocal that the indigenous peoples of Australia have inhabited the continent for a very long period of time. In contrast to this extensive period, European settlement merely represents a tiny percentage of the time-span of human presence in Australia. Nevertheless, despite the long survival of the Aboriginal people prior to the settlers´ arrival, it is estimated that roughly 90 percent of the Aboriginal population was wiped out by hand of the settlers by 1850.[34] Michele Ivanitz describes the process as follows: 'Following invasion and colonization by Europeans, indigenous people were often deprived of personal liberty and their very existence was threatened by disease and by official and unofficial violence against them.'[35] In addition, David Mellor argues that the conviction of the settlers, 'the White doctrine of *terra nullius*, or empty land, denied the history, culture, humanity, and even the very existence of Aboriginal people,'[36] since the *terra nullius* doctrine entailed the idea that Australia was an vacant land, owned by no-one. Consequently, 'all eventually lost the freedom to exercise their status as self-determining people.'[37]

1.1.2 Canada

In Canada, encounters between explorers and indigenous peoples began slightly earlier. From 1497 onwards, both English and French explorers touched upon the Canadian shore. These first contacts however, were mainly motivated by either fishing (by the English) or fur trading (by the French). Due to the presence of both the English and the French in the region, both powers deemed it useful to form alliances with the present indigenous population. In doing so they could use the existing feuds between several indigenous groups for their own advantage. Consequently, when European settlement started, instead of battling the settlers, the indigenous groups sometimes fought each

[34] D. Mercer, (1997), "Australia's Indigenous Population and Native Title", in: *Geodate*, Vol. 10, Iss. 1, (March 1, 1997), p. 1.
[35] M. Ivanitz, (2002), "Democracy and Indigenous Self-determination" in: April Carter & Geoffrey Stokes, *Democratic Theory Today*, (Cambridge, 2002), p. 124.
[36] D. Bretherton and D. Mellor, (2006), "Reconciliation between Aboriginal and Other Australians: The 'Stolen Generations'", in: *Journal of Social Issues*, Vol. 62, No. 1, 2006, p. 82.
[37] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 124

other, with weapons provided by the English and the French, conveniently thinning their own population stimulated by the European powers.[38]

The first colonization mission of France, led by Samuel Champlain, reached the area known as Acadia in 1604. Nevertheless, although this settlement was established in 1604 and the first English settlement in 1610, neither of them were viable. Conversely, Louis Hebert is perceived as the first permanent (French) settler, upon his arrival in Quebec in 1617.[39] Despite him not being the first to start a camp in Canada, he was the first who remained, raised his family there and lived of the land. The French were also the first to start exploring the Canadian hinterland, and the founders of the city Quebec. Hence, the first period of Canadian colonization is marked by French dominance.

However, British influence in Canada increased and from 1629 onwards many years of war between France and England followed, in which many of the regions indigenous groups were involved. The Peace of Paris in 1763 forced the French to relinquish all their claims to Canadian territory, leaving the British as the dominant ruler in Canada. In addition to a vast span of territory, this agreement also gave the British control over approximately 50.000 French inhabitants.[40]

As in Australia, many indigenous people in Canada died due to diseases brought from overseas by the settlers. In addition, many perished in violent confrontations between settlers and indigenous groups. However, in contrast to the indigenous population in Australia, in Canada some indigenous groups were already disputing each other's' claims to for instance hunting grounds or territory. The settlers conveniently used these existing disputes to battle their own contestants.

Nonetheless, the most significant difference between the early settlement of Australia and Canada is the treaty-making between settlers and indigenous groups in Canada. Whereas the settlers in Australia colonized the country under the doctrine of *terra nullius*, the explorers of Canada did not originally seek a place for permanent residence. As opposed to the goal of the Australian settlers, the primary goal of the Canadian explorers was to gain indigenous resources (like fur or fish) for overseas trade. Hence, the Canadian explorers needed the indigenous people in order to establish their goal; therefore they ensured cooperation by means of treaties with indigenous groups. From 1871 to 1921 a series of eleven treaties was signed between indigenous peoples in Canada and the reigning monarch of Canada. These treaties are in effect agreements with the Government of Canada. No similar events took place in Australia, which has been of influence to the claiming of certain (land) rights later on, which Chapter two will demonstrate.

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[38] R. Perry, *From Time Immemorial,* p. 124-127.
[39] See: G. Goulet and T. Goulet, (2007), *Louis Hebert and Marie Rollet: Canada's Premier Pioneers,* (Calgary, 2007).
[40] R. Perry, *From Time Immemorial,* p. 127

1.2 Early Government Policies and Stolen Generations

The early years of encounters between settlers and indigenous peoples in both Australia and Canada were characterized by clashes and violence between the two, which brought the indigenous peoples on the brink of extinction. Despite differences in historical context between Australia and Canada, Ivanitz argues that there is general agreement 'that four broad policy frameworks were applied over roughly the same time periods: protection, segregation, assimilation, and self-determination.'[41] Ivanitz poses that from the moment of settlement onwards, the British crown considered the indigenous peoples 'British subjects' and regarded them as deserving some sort of protection. However, the British government lacked instruments to ensure the enforcement of this protection, and most settlers were preoccupied with realizing their own interests, thus the protection policy failed.

Contrary to Ivanitz' beliefs, the following periods of segregation and assimilation started earlier in Canada than in Australia. Whereas the period of segregation in Australia did not start until the late nineteenth century, in Canada this occurred close to a hundred years earlier, around the 1830s. Similar in both countries however, was that during this period the settlers essentially deemed the indigenous peoples a dying race for which all the government could do was 'smooth the dying man's pillow'.[42] The segregation period concurrently brought a series of harsh policies concerning the indigenous peoples. Many lost their lands and were forcibly relocated onto reserves or missions. Sir Francis Bond Head, governor-general of Upper Canada in 1836, for example considered 'reserves and educational programs a waste of resources and advocated removing Indians to islands where they could die in peace.'[43]

Conversely, the most notorious of these policies, implemented during both segregation and assimilation periods, were the ones that ordered the removal of indigenous and half-caste children from their parents to raise them in homes and residential schools in white mainstream society.[44] The assimilation period arose in both countries out of the notion that indigenous peoples in fact were not dying out at all. Therefore, in name of preparing the children for a "better" life in the dominant Anglo-Saxon society, children were removed from their families and cultures and put into homes and residential schools. At present, these policies are acknowledged in both Australia as Canada for having caused extreme harm and suffering to indigenous families, society and culture by removing children from their communities. The children who have been removed, or rather, the victims of this

[41] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 125.
[42] Ibid.
[43] R. Perry, *From Time Immemorial,* p. 139.
[44] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 125.

policy, are currently known as the "Stolen Generations".[45] Although many of the policies also restricted indigenous peoples' freedom of movement, in dictating forced removal from lands, in forcing them to work and in controlling personal finances, the policies ordering the removal of children are generally perceived as having inflicted the greatest injustice, since they effectively traumatized an entire population.

In Australia the policy was implemented under the Aboriginal Protection Act of 1869 and carried out until at least 1969, presumably even until the late 1970s. The 1997 *Bringing them home* report by the Australian Human Rights and Equal Opportunities Commission (HREOC) sums up its estimation of "stolen children" as 'lying between one in three and one in ten in the period between 1910 and 1970',[46] and points out that 'not one indigenous family has escaped the effects of forcible removal' and that 'most families have been affected, in one or more generations, by the forcible removal of one or more children'.[47] This effectively influenced the entire Aboriginal society: Since the children who were removed from their parents and put into homes were not permitted to speak their own language, nor honor any form of their own culture, these children inevitably lost their ties to it. Subsequently, at eighteen, these children were "released" from the homes and could choose to go and search for their families. However, on the rare occasion that they did succeed in finding them, they more often than not found it impossible to accustom their selves with a culture they had been forced to forget.[48]

The equivalent of this policy in Canada issued putting indigenous children in residential schools funded by the Canadian government and operated by the four main churches in Canada. In contrast to Australian child removal, the residential school era began slightly earlier, in 1874.[49] These schools were erected by the Bagot Commission under the pretext of education being crucial for the children in their contemporary situation.[50] The last of these schools, located in Saskatchewan, was shut down as late as 1996, and by that time over 150.000 children had been forcibly removed from their families and homelands.[51] Once uprooted from their communities, indigenous children sent to

[45] C. Bird, (1998), *The Stolen Children: Their Stories*, (Random House Australia, North Sydney, 1998), pp. 1-15.
[46] R. van Krieken, (2004), "Rethinking Cultural Genocide: Aboriginal Child Removal and Settler-Colonial State Formation", in: *Oceania,* Vol. 75, No. 2, pp. 125-151, p. 126.
[47] Ibid., p. 126.
[48] See: C. Bird, *The Stolen Children*
[49] P. O'Connor, (2000), "Squaring the Circle: How Canada Is Dealing With the Legacy of Its Indian Residential Schools Experiment", in: *Australian Journal of Human Rights*, Vol. 188, no. 6, Iss. 1, p. 235.
[50] R. Perry, *From Time Immemorial,* p. 141.
[51] J. Corntassel and C. T'lakwadzi, (2009), "Indigenous Storytelling, Truthtelling and Community Approaches to Reconciliation", in: *English Studies in Canada*, Vol. 35, Iss. 1, 1 March 2009, pp. 137-150, p. 140.

the institutions were required to unlearn their languages and cultures in order to promote their assimilation into the dominant culture.[52]

Similar to the HREOC in Australia, in Canada the Royal Commission on Aboriginal People was established in 1991 in order to examine the social, economic and cultural conditions of indigenous people in the country. Despite the Canadian government maintaining until recently that the schools were conducted merely for educational purposes, one of the Royal Commission's most important findings was that the sole purpose of these residential schools was indeed to assimilate the children by 'helping them get over being Indians.'[53] The Royal Commission exposed that 'as part of the strategy to absorb them into Euro-Canadian society, children were subjected to denigration of their culture, and were punished for speaking their own languages.'[54] Furthermore, the Royal Commission's 1996 report conveyed widespread physical, sexual and emotional abuse suffered over many years by children in the residential schools.[55] Mark Flisfeder poses a similar statement, in his article concerning The Indian Residential School (IRS) Truth and Reconciliation Commission (TRC). He argues that the establishment of the IRS TRC in 2009, was solely to address the suffering the indigenous community still undergoes due to ongoing impact of the residential schools era:

> The atrocities are deeply set in the bowels of Canadian history, since the IRS system had a significant impact on the destruction of language, culture and identity of Aboriginal communities. Children were forcibly taken away from their families and punished for speaking their native tongue or observing traditional practices. Traditional systems were regularly belittled and denigrated by the operators of the schools.[56]

Concurrently, O'Connor argues that although many condemn the systematic abuse conducted at the schools, the Royal Commission pointed out that the biggest injustice has been 'the system's objective of annihilating aboriginal cultures which entailed an inherent element of savagery.'[57]

1.3 Genocide, ethnocide, cultural genocide

[52] J. Corntassel and C. Holder, *Who's sorry now?*, p. 8.
[53] P. O´Connor, *Squaring the Circle,* p. 235.
[54] Ibid., p. 236.
[55] Ibid., p. 235.
[56] M. Flisfeder, (2010), "A Bridge to Reconciliation: A Critique of the Indian Residential Schools Truth Commission", in: *The International Indigenous Policy Journal*, Vol. 1, Iss. 1, 1 May 2010, (Berkeley Electronic Press), p. 3.
[57] P. O'Connor, *Squaring the Circle,* p. 236.

The policies issuing the forced removal of indigenous children from their families to put them into homes and residential schools in both Australia and Canada have in the contemporary literature been understood by some[58] as constituting acts of genocide and/or ethnocide/cultural genocide. If this claim could be proven, one could establish a punishable crime for which the government could be held accountable today. However, it is not likely that such an outcome in the debates in both Australia as Canada centering on this controversial topic will ever be reached. However, before elaborating on this matter this paper will first shortly define the concept of genocide, as well as ethnocide and cultural genocide, and name the most relevant arguments in the respective debates.

Both concepts of genocide and ethnocide have been established by Polish-born lawyer Raphael Lemkin with regard to the Jewish Holocaust during World War II. Lemkin posed that both concepts are interchangeable and in essence bear the same meaning: 'the criminal intent to destroy or cripple permanently a human group'.[59] Lemkin's statement thereafter became the backbone of the United Nations Genocide Convention (UNGC).[60] Article II of the Genocide Convention marks as genocide: 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group', including 'Forcibly transferring children of the group to another group'.[61]

The concept of ethnocide moreover, is not only seen as synonymous with the term genocide, but also with the concept of cultural genocide, nowadays understood as destroying groups 'that could not continue to exist without the spirit and moral unity provided by their culture.'[62] Sautman refers to ethnocide as the 'extermination of a culture that does not involve physical extermination of its people'[63], as distinguished from genocide which does, according to Sautman, entail physical extermination.[64]

When arguing for or against the validity of either one of the concepts in the Australian and Canadian cases, the intention with which the policies were designed and implemented is of fundamental importance. According to the UNGC, only those acts that were designed and carried out with the intention of destroying completely or partially a certain group can be marked as genocide. However, if this intention was not explicitly specified by the designers or executers of the policy, it has proven very difficult to verify such an intention retrospectively.

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[58] See: R. van Krieken; Chrisjohn & Young.
[59] D. Neu and R. Therrien, *Accounting for Genocide*, p. 15; Lemkin 1947: p. 147
[60] Ibid., p. 15.
[61] http://www.hrweb.org/legal/genocide.html, 05-05-11
[62] B. Sautman, (2003) "'Cultural genocide' and Tibet", in: *Texas International Law Review*, Vol. 38, No. 2, pp. 173-247, p. 182.
[63] Ibid., p. 177.
[64] Ibid.

In both Australia as Canada the governments responsible for implementation of the policies argued that the policies were designed and implemented with the children's best interest at heart, aiming to provide them with a better life and more prosperous future. Hence, according to these statements the intention of the policies did not comprise the goal of physically exterminating the indigenous group.[65]

However, the HREOC 1997 *Bringing them home* Report did conclude that in Australia, the forcible removal of children from their homes constituted acts of genocide. The then Minister for Aboriginal Affairs John Herron said in response that one cannot judge actions and practices of the past by today's standards,[66] meaning that the concept of genocide did not even exist at the time the policies of child removal were implemented. Others argued against the label of genocide by underlining the presumed good intentions of the policy: 'while the act of removing children from their parents was a tragic trauma for those involved…it was done with the intent, while wrong and misinformed, of "improving" the children's lives. It was not done with malicious intent.'[67]

Nevertheless, Van Krieken provides that in Australia, 'merging, absorption and assimilation into the ways of civilization'[68], were the key concepts lying at the root of the policy. These concepts originated through the assimilationist movement, and comprised of the idea that Aboriginal culture and lifestyle encompassed no significant value at all.[69] This intention and these beliefs were confirmed by Paul Hasluck, Australian Minister for Territories from 1951 to 1963, when he stated in a speech for the house of representatives in 1950: 'their future lies in association with us, and they must either associate with us on standards that will give them full opportunity to live worthily and happily or be reduced to the social status of pariahs and outcasts living without a firm place in the community.'[70] Herein lays the resilient belief in the superiority of European culture, in implying that the only future for Aborigines lies in assimilating and thereby abandoning their Aboriginal culture, language, beliefs and practices. Van Krieken therefore argues that although the policymakers perhaps claimed to have had the children's best interest at heart, it is clear that this best interest entailed the complete eradication of the removed children's aboriginality, which is thus consistent with the intention of destroying in part a certain cultural group, hence an act of genocide.[71]

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[65] See: C. Bird, *The Stolen Children*; D. Neu & R. Therrien, *Accounting for Genocide*.
[66] ABC report, 3/4/2000, *No Stolen Generation*, online available via: http://www.abc.net.au/7.30/stories/s115691.htm
[67] S. de Vroom, *Sydney Morning Herald,* Letters, 27 May 1998.
[68] R. van Krieken, *Rethinking Cultural Genocide,* p. 127.
[69] Ibid., p. 127.
[70] Ibid., p. 128-129.
[71] Ibid., pp. 128-132.

Furthermore, arguments that the policy does not qualify as an act of genocide, since it did not eliminate Aboriginal culture completely, and, not all Aboriginal children were removed from their families, were countered by the HREOC *Bringing them Home* Report, which stated that the core of the crime of genocide is the intention to destroy the group and not the degree to which that intention has been realized. Therefore, genocide is committed even when the elimination has not been carried out in full.[72]

In the Canadian case Judge Murray Sinclair, head of the Canadian Truth and Reconciliation Commission, has posed that the purpose of the residential schools was to indoctrinate children into a different cultural milieu: 'the Canadian authorities deliberately set upon a campaign […] to teach a child that their culture was inferior, their people were inferior, their language was inferior and not to be spoken.'[73]

As in Australia, an investigation was launched which resulted in a five-volume report by the Royal Commission on Aboriginal Peoples, titled *People to People, Nation to Nation* in 1996. The Report concluded that the main policy direction of the past, namely assimilating Aboriginal peoples into mainstream Canadian society, had been wrong and highly destructive to indigenous life and culture. It did not however mention either (cultural) genocide or ethnocide.[74] Nevertheless, after the release of the report charges of genocide continued to emerge. The 1998 Report *Hidden from History: The Canadian Holocaust* published by the Truth Commission into Genocide in Canada, for instance structures its arguments in accordance to the articles of the UNGC. With regard to the intention of the policies establishing the Residential School system, the Report poses the following:

> The foundational purpose behind the more than one hundred Indian residential schools established in Canada by government legislation […] was the deliberate and persistent eradication of Aboriginal people and their culture […].'According to the report this intention shows clearly from the Gradual Civilization Act 1857, which 'defined Aboriginal culture as inferior, stripped native of citizenship and subordinated them in a separate legal category from non-Indians.[75]

[72] Human Rights and Equal Opportunities Committee (HREOC), (1997), "Bringing them home" Report, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia, 1997, pp. 237-238.
[73] S. Griffiths, *Reclaiming a lost identity,* interview with Judge Murray Sinclair, head of Canada's Truth and Reconciliation Committee, 5 January 2011, available online via: http://www.newint.org/features/web-exclusive/2011/01/05/reclaiming-a-lost-identity/
[74] http://www.aadnc-aandc.gc.ca/eng/1100100014597
[75] Truth Commission into Genocide in Canada, (2001), *Hidden from History: The Canadian Holocaust*, p. 12.

Conversely, Chrisjohn and Young illustrate that both Canadian Churches as the Federal government have claimed in recent years that although in hindsight the Residential schools have proven very destructive for indigenous groups and culture, the policies were implemented from a strong belief of doing good, building a nation and providing the children concerned with the fundamental rights of education and Christianity. Chrisjohn and Young label this the "saintly but misguided motives" – model.[76] They continue by stating that despite the government and churches' claim of good intentions, the "real" intention of the government is made clear in any number of public statements from that era, such as the following:

> I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department.[77]

As the statement by Australian Minister for Territories Paul Hasluck, this by and large similar statement shows the intention to assimilate all indigenous people into mainstream society entirely, in part by means of eradicating the aboriginality of the forcibly removed children. However, the complicating factor in this debate remains the fact that even this belief, no matter how wrong and ethnocentric in retrospect, could have emerged from the genuine belief that this would in fact provide the children concerned with a better future and thus sprang from good intentions.

Nevertheless, the phrase "good intention" is problematic in itself, since "good" is a relative notion. Perhaps, emphasis should thus be put solely on "intention", since despite the claimed "good intentions" of the respective governments, the statements make clear that these intentions did entail the eradication of the children's aboriginality, hence the destruction of (part of) a certain ethnic, national group, and thus, following the definition of the UNGC, acts of genocide.

1.4 Contemporary disadvantages due to settler colonialism

Whether one defines the policies that resulted in the Stolen Generations in both Australia and Canada as acts of genocide or not, the policies undeniably increased the trauma already inflicted upon the indigenous people by settler colonialism. Due to both colonialism and government

[76] R. Chrisjohn and S. Young, (1997), *The Circle Game: Shadow and Substance in the Residential School Experience in Canada*, Penticton, 1997, p. 9-10.
[77] Duncan Campbell Scot, deputy superintendent Department of Indian Affairs 1913-1932, Statement, 1920.

assimilation policies in the past, indigenous peoples in Australia and Canada now suffer severe socio-economic disadvantages.

In Australia, to this day, indigenous infant mortality rates are far above the national average. Moreover, indigenous people are far more likely to suffer hypertension, cancer, stroke and respiratory ailments than non-indigenous Australians. In addition, high rates of alcohol and drug abuse as well as domestic violence and sexual abuse are common in most Aboriginal communities, because of low self-esteem, poor quality of life, ill-treatment and traumas. Furthermore, indigenous unemployment rates are six times the national average, average income is much lower than that of non-indigenous inhabitants and attained educations levels are dramatically below those of the non-indigenous population.[78] Most striking however is the life expectancy of Aborigines in comparison to non-indigenous people in Australia: approximately ten years lower.[79]

In Canada one finds a similar divde between the indigenous and non-indigenous population. Canadian Aborigines face a three to five time's higher chance of suffering from chronic diseases such as diabetes and a ten time's higher chance of developing tuberculosis. Suicide rates for indigenous people are five to eleven time's higher than those of the non-indigenous population. As in Australia, indigenous life expectancy is dramatically lower than life expectancy for non-indigenous Canadians: seven to five years lower.[80]

The socioeconomic gap between indigenous and non-indigenous people in both Australia and Canada is irrefutably caused, or at least significantly amplified, by government policies in the past. Subsequent generations continuously suffer the effects of forced displacement, loss of land and being made estranged in their own country. Even more so, the policies resulting in the Stolen Generations primarily lie at the core of the troubled lives many indigenous people lead today. In Australia, Bird poses that 'the ongoing complex and compounding effects of the separation and the Stolen Generations have resulted in a cycle of hurt and damage from which it is still profoundly difficult to break free.'[81] 'In Canada,' Murray Sinclair argues, 'we have raised – on the one side – aboriginal people to believe in their own inferiority and we have raised a group of non-aboriginal people – white people – to believe in their own superiority.'[82] According to Murray, these beliefs are still embedded in many people's mentality, making it extremely difficult to overcome the socioeconomic gap. Nonetheless, the socioeconomic gap in both Australia as Canada can be perceived as one of the primary reasons to support reconciliation initiatives, linked to both practical

[78] M. Ivanitz, *Democracy and Indigenous Self-determination*, p. 124.
[79] http://www.abs.gov.au/AUSSTATS, 22-12-2010
[80] http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/fptcollab/2004-fmm-rpm/fs-if_02-eng.php, 06-05-2011
[81] C. Bird, *The stolen Children,* p. 12.
[82] S. Griffiths, *Reclaiming a Lost Identity.*

and substantive reconciliation. For many, it is unacceptable that in two of the most prospering, well-developed countries in the world part of the population is dealing with such severe socioeconomic problems. Steven Cornell underlines this notion by noting that Australia and Canada are among the wealthiest nations in the world, and states therefore that 'it is an often noted irony – and an occasional source of embarrassment to the governments of these countries – that the indigenous peoples within their borders are in each case among the poorest citizens'.[83]

[83] S. Cornell, (2006), "Indigenous peoples, poverty and self-determination in Australia, New Zealand, Canada and the United States", in: *Joint Occasional Papers on Native Affairs (JOPNA)*, No. 2, 2006, p. 1.

If we are to join survivors on a journey to recover from the residential school experience, what is our particular role and responsibility? Is it to "help" Indigenous people recover from the devastating impacts of prescriptive policies and programs that we claimed were supposed to help them? Given our dismal track record, this seems a dubious goal. Or is it to determine what we who carry the identity of the colonizer and have reaped the benefits and privileges of colonialism must do to help ourselves recover from its detrimental legacy? How will we do so in ways that speak to truth, repair broken trust, and set us on a transformative decolonizing pathway toward more just and peaceful relations with Indigenous people?

Paulette Regan, *Unsettling the Settler Within,* 2010

Healing is about a family finding its way home, and about communities finding their sense of pride and cultural vitality again. It is about making things right in a nation deeply divided about the principles of justice, equity and a fair go for indigenous Australians.

Gregory Phillips, 2007

2. Policies, initiatives and mechanisms of restorative

The following paragraphs will assess several policies, treaties and forms of restorative justice implemented in Australia and Canada. This chapter will attempt to determine whether there are significant commonalities and/or differences in policies and initiatives implemented in both countries and to what extent these policies and initiatives have been contributive to achieving reconciliation.

2.1 International Conventions and Declarations

Before focusing on Australia and Canada specifically, it is important to note that the international community has in recent years become more concerned with human rights on a global scope. Peer pressure from the international field, especially when a country is concerned with becoming or remaining and important player in this field, can provide an incentive to alter human rights in a country. The following paragraph will assess whether the international community has had any influence on the protection of indigenous rights in Australia and Canada.

Due to the growing human rights movement which started at the end of World War II, awareness for the position of indigenous peoples gradually entered the international human rights field. This movement inspired the creation of three legal documents concerning indigenous peoples' rights. The first established document was the International Labour Organization's (ILO) Indigenous and Tribal Populations Convention 169 (1989) improved version of convention 107 (1957). The second document was The Final Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001). Lastly, the United Nations Declaration on the Rights of Indigenous Peoples, drafted by the Working Group on Indigenous Peoples (2007) was established.

By specifically including self-determination as a right for indigenous peoples in Articles 3 and 4, the United Nations Declaration on the Rights of Indigenous Peoples is by far the most controversial of these legal documents.[84] Nevertheless, despite the fact that all three of the documents stress the importance of indigenous rights, none of the documents are binding, nor do they include the option of issuing penalties to states that do not honor the documents. Moreover, of the 147 countries that voted with regard to adoption of the UN Declaration on the Rights of Indigenous Peoples, a mere four countries refused to sign: Australia, New Zealand, Canada and the United States. In doing so these four countries, which are all four inhabited by relatively large groups of indigenous peoples, made it poignantly clear that they are reluctant in granting their indigenous populations more rights.[85]

As stated by the UN press release concerning the adoption of the Declaration, Australia's representative proclaimed his government has always articulated its dissatisfaction with the references to self-determination in the Declaration. In addition, he expressed that:

> Australia supported and encouraged the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government.[86]

Canada's representative made a similar statement: 'unfortunately, the provisions in the Declaration on lands, territories and resources were overly broad, unclear, and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have been settled by treaty.' [87]

Currently however, the four nations which initially refused to sign the Declaration have all reversed their original stance and have all currently signed the Declaration. Australia endorsed the non-binding Declaration in April 2009. Minister for Indigenous Affairs Jenny Macklin posed in a public statement announcing the decision that the position change was done 'in the spirit of re-settling the relationship between indigenous and non-indigenous Australians and building trust'.[88] Albeit this statement, she does specifically mention the non-binding character of the Declaration: 'While it is non-

[84] http://www.un.org/esa/socdev/unpfii/en/drip.html, Article 3, 11-05-2011.
[85] http://www.un.org/News/Press/docs/2007/ga10612.doc.htm, 19-05-2011.
[86] Ibid., 19-05-2011.
[87] Ibid., 19-05-2011.
[88] Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the UN Declaration on the Rights of Indigenous Peoples,* 3 april 2009, Parliament House, Canberra, via http://www.indigenousportal.com/World/Australia-Government-endorses-UN-Declaration-on-the-Rights-of-Indigenous-Peoples.html

binding and does not affect existing Australian law, it sets important international principles for nations to aspire to.'[89]

Canada did not endorse the Declaration until more than a year later, in November 2010. The government indicated in a statement that after careful and thoughtful consideration it had concluded that it is better to endorse the Declaration while concurrently explaining its concerns, than outright rejecting the document. The government's concerns however, are echoed in the statement on the endorsement of the Declaration:

> These concerns are well known and remain. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.[90]

It appears from both governmental statements that not all of the original reluctance of becoming a signatory of the Declaration has disappeared. It is possible that United Nations' or more general international disapproval of the countries not signing has motivated them to reverse their decisions. Reactions from the indigenous community in both countries were optimistic, though not overtly enthusiast. Assembly of First Nations National Chief Shawn Atleo for instance praised the endorsement of Canada as a positive development: 'Today marks an important shift in our relationship, and now, the real work begins. Now is our time to work together towards a new era of fairness and justice for First Nations and a stronger Canada for all Canadians, guided by the Declaration's core principles of respect, partnership and reconciliation.'[91] In Australia, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda said in a public statement one year after the endorsement of the Declaration by the Australian government: 'Last year's formal support of the Declaration by the Australian Government was an essential first step, but the challenge remains for all Australians to embrace these standards.'[92]

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[89] Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the UN Declaration on the Rights of Indigenous Peoples,* 3 april 2009, Parliament House, Canberra, via http://www.indigenousportal.com/World/Australia-Government-endorses-UN-Declaration-on-the-Rights-of-Indigenous-Peoples.html

[90] Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, via: http://www.aadnc-aandc.gc.ca/eng/1309374239861

[91] http://www.culturalsurvival.org/news/canada/canada-endorses-un-declaration-rights-indigenous-peoples

[92] M. Gooda, Media release, 1 April 2010.

It appears, thus, that the Australian and Canadian governments have thus far acted fairly similar with regard to the legitimation of their actions in the international field. Furthermore, although both countries have currently endorsed the Declaration, the initial reluctance and the remaining concerns the governments express are not beneficial to the reconciliation process. The sentiments voiced by the indigenous communities in both countries however, do present an optimistic view and contentment over the fact that both countries are now official signatories. Both Shawn Atleo as Mick Gooda however state that the signing can be considered a step in the right direction, but that it is merely a beginning. Nevertheless, the positive reactions from the indigenous communities show that the signing can be considered a contributive factor to achieving symbolic reconciliation.

2.2 Land rights, Treaties, Equal Rights, Group Rights

2.2.1 Early Treaties and Native Title in Canada

Whereas land rights and treaties are concerned, early colonial history shows a different dynamic in Canada than in Australia, which is still relevant today. Despite the current similarities between Australia and Canada, the history of colonial settlement of the two nation-states slightly differs, as shown in chapter 1. Whereas in Australia the settlers primarily ignored the indigenous population, in Canada this was not the case. The Canadian settlers realized at an early stage the fruitfulness of treaty-making with Canada's indigenous peoples. Although the majority of these treaties did not benefit the indigenous peoples of Canada, it nevertheless initiated an interaction between the indigenous and non-indigenous peoples that differed from the one occurring in Australia, and this has affected indigenous claims and government response later on.

According to Richard Perry, most of the early treaties between the indigenous peoples of Canada and the Canadian settlers spoke of "peace and friendship", often involving the settlers' right to travel unmolested or the promise that the indigenous group would support or would stay neutral in European conflicts.[93] Although in retrospect these treaties were mostly for the benefit of the settlers, they were however agreed upon by both the indigenous as the non-indigenous parties.

From 1763 onwards most Canadian treaties involved the use and occupation of land, starting with the Royal Proclamation. The 1763 Royal Proclamation included the granting of lands to indigenous people where they could settle in reserves. The British motivation for including this specific topic was twofold: They argued that in granting the indigenous people land to live on they would be free to colonize the rest of the land, and they expected a flow of indigenous people from

[93] R. Perry, *From Time Immemorial,* p. 134.

the American colonies, who could then also be appointed to the reserves.[94] The Royal Proclamation did however recognize native title to un-ceded lands, but was shortly thereafter followed by the Constitution Act of 1791, which legitimized the presumption of land ownership by royal decree and by force, which resulted in large masses of (formerly indigenous) lands being impropriated by the colonists.[95]

Similar to the early treaties they entered into, the indigenous population generally agreed to these new treaties concerning lands without coercion. The problem however was, as Perry argues, that due to the extremely divergent cultures of both indigenous groups and settlers, the indigenous people simply did not understand the concept of selling land. In the Australian as well as the Canadian Aboriginal culture, land had and has a entirely different meaning than in the western culture. Whereas western culture highly values the ownership of property and concurrently the rights of the individual who owns the property, indigenous perspective of land and water broadly puts emphasis on collective responsibility for the earth and the resources it provides. Essential in the indigenous concept of land are the strong spiritual ties and obligations to a certain area.[96] Hence, in the Canadian treaty-making process, although many indigenous people had long-established views of group territory, the concept of selling land as private property was incomprehensible to them. Therefore, according to Perry, in most of these treaties concerning land, 'they saw treaties as devices for establishing relationships between people rather than between people and land.'[97]

Furthermore, though at the start lands were actually bought in an exchange of land for money, later on the Crown decided it would instead buy lands by paying the interest component in perpetuity, meaning the provision of food and cloths. At this point the bargaining position of many indigenous peoples was already weakened to the point that many saw no other alternative but to accept these unequal arrangements.[98]

Suffice to say, Canadian history shows that despite the fact that in some situations this early treaty-making did establish some form of harmonious relationship between settlers and indigenous people, ultimately the indigenous people ended up on the lower end of the equation. On many occasions, the government failed to live up to treaty terms and eventually most indigenous people were deprived of their lands and forced to live on reserves. However, the early treaty-making in Canada did have an effect that had no equivalent in Australia: Although the Canadian government did apply the principle 'that indigenous peoples had not cultivated the land and had no true societies,

[94] http://www.canadiana.ca/citm/themes/aboriginals/aboriginals3_e.html
[95] D. Neu and R. Therrien, *Accounting for Genocide,* p. 34.
[96] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 127-128.
[97] R. Perry, *From Time Immemorial,* p. 134.
[98] D. Neu and R. Therrien, *Accounting for Genocide,* p. 58-59.

and thus had no claim of territorial ownership,'[99] the fact that indigenous land rights and native title appeared in treaties as early as 1763 did make a difference in land rights discussions later on. Although opinions about the meaning of these treaties still differ, the written proof that there was at least a notion of indigenous land rights this early in Canadian history is a fact many indigenous people have later based their land rights claims upon.[100]

In Australia, no similar events took place. Perry states that 'The Crown has never forcibly seized Australia by conquest, nor has it acquired the territory through purchase or treaty.'[101] Based on the *terra nullius* doctrine the British upheld, they justified simply inhabiting the lands without further notion of the indigenous population. Linking this to the concept of reconciliation, one could argue that the ground for reconciliation is stronger in Canada than in Australia. Since, reconciliation requires interaction and dialogue, which in Canada has occurred in some shape or form from the first encounters onward. Albeit the fact that this interaction was unequal, it at least provided an opening for improvement. In Australia conversely, the indigenous people were considered non-existent for the main part of European settlement.

2.2.2 Indian Act and Constitutional Protection

Another significant difference between Australia and Canada was the erection of a separate Act concerning Canada's indigenous peoples in 1876: the Indian Act. This Act was enacted by the Canadian government under the Constitution Act of 1867, and gave the government exclusive authority to legislate with regard to Indians and Lands reserved for Indians. This Act furthermore defined who qualified as an Indian and who would thus be subject of the Act. The Act was originally designed to assimilate Indians – First Nations – into white mainstream society, and could dictate nearly every aspect of indigenous lives. The Act solely defined as Indians indigenous people currently known as First Nations, resulting in the exclusion of Inuit and Métis people from the many restrictions the Act entailed. Nevertheless, the Act simultaneously provided some (financial) benefits, of which the Inuit and Métis where thus excluded from as well.[102]

Similar to the early treaties between Canadian settlers and Canada's indigenous peoples, the Indian Act was initially not contributive to a reconciliation process. Even more so, the Act is currently considered as having caused extreme harm and suffering to the indigenous people.[103] Nevertheless, a similar dynamic of harm and suffering occurred in Australia, though without it being issued by an

[99] R. Perry, *From Time Immemorial,* p. 137.
[100] Ibid., p. 137-138.
[101] Ibid., p. 176.
[102] D. Neu and R. Therrien, *Accounting for Genocide,* pp. 81-84.
[103] Ibid., p. 87.

Act. The difference between the two countries, and concurrently the benefit for Canada's indigenous people – if one can speak of benefit in these matters – lies in the fact that the Indian Act was established under the Canadian Constitution enabling, consequentially, the constitutional entrenchment of indigenous rights in Canada. In Australia, as Ivanitz underlines, this is not the case: 'In Australia native title is not protected in the constitution and there is no history of treaties between the Crown and indigenous people.'[104]

This difference continues to this day. The rights of indigenous people in Canada are currently protected under Part I, Section 25 and Part II, Section 35 of the Constitution Act 1982, which state:

> PART I
> Section 25 of the Charter of Rights:
> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
>
> PART II
> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[105]

[104] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 132.
[105] Constitution Act 1982, Part I, Section 25 and Part II, Section 35, available online via: http://www.sfu.ca/~aheard/abrts82.html

Thus, although the Constitution Act does not create new or more rights for Indigenous peoples in Canada, it does provide the guarantee that existing rights are now constitutionally protected.

Australia's Constitution conversely, does not include a Bill of Rights, nor a mention of indigenous rights.[106] This implies that the fundamental rights and freedoms of Australia's inhabitants, both indigenous as non-indigenous, are not constitutionally protected. This fact marks Australia as the only common law country without a Bill of Rights. The Australian Human Rights Commission has stated on this matter in 2010:

> The absence of an entrenched guarantee of equality / non-discrimination in the Constitution is of particular concern due to current laws that discriminate against Indigenous peoples on the basis of race. While there are federal, state and territory discrimination laws, there are inconsistencies between them, their coverage varies and is not comprehensive.[107]

These factors to this day greatly limit the recognition of Aboriginal (land) rights in Australia,[108] and thus stand in the way of achieving reconciliation. It seems, thus, that historical events in Canada have led to a better protection of indigenous rights and have thus created a more favorable starting point for a reconciliation process.

2.2.3 Equal rights vs Group Rights

A significant policy change in both Australia as Canada concerning indigenous people was the moment when in the late 1960s treaties and Acts were abandoned for a new policy that stressed the equality of all inhabitants. In Australia this entailed that indigenous people were acknowledged as being citizens of the Australian nation-state, since prior to this watershed in policy they were merely subjects of the state and thus, in effect, part of the 'flora and fauna' of Australia.[109]

In Australia this event occurred through referendum, in 1967, following a thirty year-long campaign of several indigenous leaders. In Canada the liberal government under Pierre Elliot Trudeau and Minister for Indian Affairs Jean Chretien released a government position paper in 1969. This position paper, titled the *White Paper*, was drawn up after extensive consultation with indigenous

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[106] The Constitution, Act Constituting the Commonwealth of Australia, 9 July, 1900, available online via: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/media/05%20About%20Parliament/52%20Sen/523%20PPP/constitution%20pdf.ashx

[107] See: A. Nicholson, (2010), *Human Rights, The NT Intervention and The Racial Discrimination Act,* An Address to the Annual General Meeting Social Policy Connections Forum, 1 December 2010.

[108] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 132.

[109] R. Broome, *Aboriginal Australians,* p. 36.

leaders, and similar to the Australian sentiments stressed 'the equality of all Canadians alike'.[110] It furthermore stated that since all Canadians are equal, no special status or privileges would be granted.

Nor in Australia, nor in Canada were the above mentioned events contributive to a reconciliation process. The acknowledgement of indigenous people as citizens of the nation-state they live in makes them equal to the non-indigenous citizens and therefore concerns equal rights.[111] Although these equal rights campaigns were in principle a step in the right direction – especially in Australia since prior to the referendum Australian Aboriginals did not have any rights at all – the idea of equal rights did not appeal to most indigenous people. Equal rights, namely, did not leave any room for the specific group rights the indigenous peoples valued and felt they deserved,[112] and the equal rights campaigns therefore were viewed as yet another measure of assimilation implemented by the government.[113] Gunstone underlines this in posing that reconciliation can only be achieved when the government is willing to grant specific indigenous rights.'[114]

2.3 The path toward Substantive Reconciliation: Revolution in Native Title

Fundamental in the indigenous struggle for recognition and rights, are indigenous claims to land and native title. As chapter one has briefly touched upon, nearly all indigenous people in Australia and Canada have at one point or another been deprived of their lands by the settlers and their descendants. The granting of land rights and native title – meaning that the land rights of indigenous peoples to customary tenure persist after the assumption of sovereignty under settler colonialism – are part of substantive reconciliation. The indigenous struggle to obtain land rights and native title in both countries continues to this day. However, a similar, controversial dynamic occurred in both countries with regard to this land claims process. The following paragraphs will discuss these respective revolutions in the land claims processes and the effects they have had on substantive reconciliation.

[110] *The White Paper*, http://www.oneca.com/1969_White_Paper.pdf, 26-05-2011
[111] A. Gunstone, *Unfinished Business,* p. 7.
[112] J. Kane, (2002), "Democracy and Group Rights", in: A. Carter and G. Stokes, *Democratic Theory Today*, (Polity Press, Cambridge, 2002), pp. 98-101.
[113] R. Perry, *From Time Immemorial,* p. 150.
[114] A. Gunstone, *Unfinished Business*, p. 310.

2.3.1 Australia: Mabo and Wik

In Australia native title to land was not formally recognized until 1992, when the High Court presented its verdict in the case of *Mabo v. the State of Queensland*.[115] Regarding this case, the High Court established that particular indigenous property rights had existed prior to the establishment of Commonwealth sovereignty in Australia, and had continued to exist during this sovereignty. The judgment also provided that Aboriginal people may hold native title to land based on their continuing connections with areas of land or waters, consistent with their traditional law or customs. Since prior to this decision native title or land rights were nearly impossible to obtain for indigenous people in Australia, the judgment was deemed highly controversial.[116]

In 1993, the Labor government established the Native Title Act, which concurrently enabled the erection of the Native Title Tribunal, an institution established in order to regulate the land claims of Indigenous people in the aftermath of the *Mabo* decision. Furthermore, in 1996, another important verdict was presented by the High Court with regard to Aboriginal access to land on pastoral leases. A pastoral lease is land owned by the Crown (or more recently: the government of Australia), which the government allows to be leased, mainly for farming purposes. In the case *Wik Peoples v Queensland*, the High Court determined that a government granting of a pastoral lease did not in principle extinguish native title to this land.[117] Nevertheless, Ivanitz provides that the High Court also determined that when indigenous rights in these particular cases were inconsistent with holders of a pastoral lease, the rights of these leasers would overrule the native title.[118]

Despite the advantage granted to non-indigenous pastoral leasers, the decisions of the High Court in both the *Mabo* and *Wik* cases brought controversy: in general the lands taken from Aborigines were taken generations ago, and the verdicts made it possible for Aborigines to claim back lands that non-indigenous inhabitants had since long considered as their own. Nevertheless, this unequivocal victory for indigenous rights was not granted a long life span. The Native Title Act and Tribunal, which were established in 1993, were not only established to regulate indigenous claims, they concurrently 'confirmed the validity of all land grants made to non-indigenous people or entities prior to the High Court's decision in *Mabo* and provided procedures for those wishing to undertake development of native title lands.'[119] Furthermore, when the Liberal National Party coalition came to power in 1996 it rapidly established certain modifications to the Native Title Act, in order to ensure the prevailing of individual property owners over Native Title even further.

[115] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 132.
[116] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 132.
[117] *Wik Peoples v Queensland,* (1996), 187 CLR 1; 141 ALR 129.
[118] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 133.
[119] Ibid., p. 133.

In response to these modifications several indigenous leaders requested an investigation into the modified Act by the United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD). The findings of the CERD read that the modifications to the Act were indeed motivated by racial sentiments with regard to indigenous rights. The CERD observed that 'legal certainty for governments and third parties had been created at the expense of indigenous rights'.[120] The government of Australia then erected a Joint Parliamentary Committee in February 2000 in order to address the claims made by the CERD. The CERD strongly urged the Australian government:

> To suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia's obligations under the Convention.[121]

However, the final report of this Committee merely rejected the CERD's concerns in its entirety, in concluding:

> That the amended Native Title Act is consistent with Australia's obligations under the CERD. Therefore, the answer to this question is obvious: no amendments are necessary to the Native Title Act in order to ensure that Australia's international obligations are complied with.[122]

Furthermore, the report stresses the difficulty for the government to suspend the modified Act and states that if it were to do so with the limited means it has available, this will also negatively affect the indigenous peoples since chapters that benefit them will have to be suspended as well.[123]

Thus, arguably, the 8 years following the controversial *Mabo* decision, the government successfully spent attempting to reverse the indigenous rights granted initially. Nevertheless, the Native Title Report of 2010 states that 'Australia has come a long way since the High Court first

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[120] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 133.
[121] Decision 2(54) para 11, CERD/C/54/Misc.40/Rev.2, via: http://www.faira.org.au/cerd/cerd-decision-on-australia.html., 14-06-2011.
[122] Chapter 8, para 4, *Sixteenth Report*, Joint Parliamentary Committee, via: http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/1999-02/report_16/report/c08.pdf., 14-06-2011.
[123] Chapter 8, para 11, 12, 13, 14, *Sixteenth Report*, Joint Parliamentary Committee, via: http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/1999-02/report_16/report/c08.pdf., 14-06-2011.

recognized native title in *Mabo*.'[124] Furthermore, the report provides that on 30 June 2010, native title was granted over 12.2% of Australia's land mass, showing for many stories of triumph for indigenous peoples.[125] This is in sharp contrast with the statement of Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, who commented in the first *Native Title Report* of 1995 that: 'Indigenous Australians hold very modest hopes for the capacity of the *Native Title Act* to deliver justice through the protection of our titles. The likelihood is that our aspirations will be confined to very limited horizons.'[126] Fifteen years later, in spite of triumphs booked, the annual Report of 2010 provides that Dodson's prediction has come true for too many Aboriginals. The bar for evidence based on which native title can be claimed has been raised again and again, and goal posts continue to be changed. Furthermore, the 2010 Report claims that:

> On many levels — legally, financially and culturally — the native title system is skewed in favour of non-Indigenous interests. Traditional Owners must surmount significant evidential barriers to prove their rights. And once a determination is made or an agreement is reached, inadequate resources may hinder the ability of Traditional Owners to effectively enjoy their rights.[127]

Over all, this proves that although slight improvement has been booked with regard to Aboriginal rights and native title, it has not nearly been enough to achieve a substantial basis for reconciliation in Australia. The 2010 *Native Title Report* basically asks the same questions as were relevant in the first report of 1995: Where do we go from here? How do we establish an effective engagement between the government and indigenous peoples? How can a fair and just native title system be created?[128] It furthermore shows from the 2010 Report that according to the indigenous community, the current native title system stands in the way of reconciliation:

> The Australian Government has failed to address the most significant obstacles within the native title system to the full realisation of our rights. These obstacles include the onerous burden of proving native title, the injustices of extinguishment, and other impediments to

[124] Native Title Report 2010, Chapter 1, via: http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/chapter1.html, 14-06-2011.
[125] *Native Title Report 2010*, Chapter 1, via: http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/chapter1.html, 14-06-2011.
[126] *Native Title Report: January–June 1994*, Human Rights and Equal Opportunity Commission (1995), p. 7, via: http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html, 14-06-2011.
[127] *Native Title Report 2010*, Chapter 1, via: http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/chapter1.html, 14-06-2011.
[128] Ibid.

> negotiating just and equitable agreements. As one Native Title Service Provider (NTSP) commented, the current nature of the law 'and the lack of substantive reform — results in significant burdens of proof and contributes to the fostering of unsustainable relationships with other stakeholders.[129]

It appears, thus, that in Australia certain changes in the native title system are required before this system can contribute to achieving substantive reconciliation.

2.3.2 Canada: Nisga'a Treaty

As argued earlier in this thesis, it is slightly less difficult for indigenous people in Canada to claim native title over certain territories than in Australia, since the historic use and occupation of certain lands were already established by the Royal Proclamation of 1763 and section 91(24) of the Constitution Act of 1867.[130] Furthermore, native title was officially embedded in the constitution through the Constitution Act of 1982.[131] Nevertheless, the Act does not specify any evidential criteria or limitations as to under which circumstances native title can be claimed.

Whereas in Australia the *Mabo* case was a significant milestone after which native title claims became easier to attain, in Canada this milestone was marked by a case concerning a certain indigenous group in British Columbia, called the Nisga'a. Under the leadership of the late Frank Calder the Nisga'a Tribal Council presented their case to the Supreme Court of Canada in order to claim their native title over a vast area of land. When the Supreme Court presented their judgment in 1973, six out of seven Supreme Court Justices concurred that the Nisga'a did hold native title in the past. Three of them conferred that the settlement of the Crown and its sovereignty in Canada had extinguished this title, yet conversely the other three ruled that it had not. Due to a technicality, the seventh justice abstained from judgment.[132] Richard Perry states on this matter: 'While the Nishga'a eventually lost the case, the judges' disagreement left an opening to challenge the hoary principle that had denied the basis of numerous indigenous land claims.'[133] Furthermore, Blackburn provides that although the judges did not come to an agreement on the issue of native title extinguishment, 'the *Calder* ruling was enough to make the federal government establish a Comprehensive Claims policy to deal with land claims where treaties had never been made, including British Columbia,

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[129] *Native Title Report 2010*, Chapter 1, paragraph 1.4a, via: http://www.hreoc.gov.au/social_justice/nt_report/ntreport10/chapter1.html, 14-06-2011.
[130] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 131.
[131] Constitution Act 1982, Part II, Section 35, Canada, via: http://www.solon.org/Constitutions/Canada/English/ca_1982.html, 15-06-2011.
[132] C. Blackburn, *Producing Legitimacy*, p. 624.
[133] R. Perry, *From Time Immemorial*, p. 158.

Quebec, the Yukon and Northwest Territories, and parts of Newfoundland and Labrador.'[134] The Nisga'a treaty of 1998 is the outcome of this extensive claims process.

Adversely, 'in 1991 the British Columbia Supreme Court denied the existence of aboriginal land rights and stated that "the discovery and occupation of this continent by European nations, or occupation and settlement gave rise to a right of sovereignty"'.[135] Furthermore, Perry argues that between 1973 and 1990, only forty-five native title cases had been settled, with 500 still remaining unresolved.

Nevertheless, despite the initial slow start of the native title settlements, a spectacular development occurred in 1999, when the indigenous peoples were granted the territorial rights of Nunavut, a region in the Northwest Territories which encompasses a fifth of Canada's land mass.[136] This thesis will elaborate on the creation of Nunavut through a case study in chapter 3. Moreover, the Nisga'a eventually were granted the native title claims they had so long been trying to obtain: in 1998 they were granted native title over 2000 square kilometers of land.[137]

According to Carole Blackburn substantive symbolic meaning has been attached to the 1998 Nisga'a treaty, in particular with regard to the reconciliation process. Blackburn states that:

> During my research I heard federal, provincial, and Nisga'a spokespersons call the treaty a symbol of 'hope and reconciliation', a 'historic reconciliation', an 'important step toward reconciliation and the dream of true equality', an attempt 'to correct the wrongdoings' of the past, and a 'balanced and sensible reconciliation of issues that have frustrated and divided British Columbians for more than a century'.[138]

According to Blackburn, these sentiments were echoed by treaty makers and government officials, and expressed most clearly by Robert Nault, the Minister of Indian Affairs who introduced the Nisga'a treaty bill for debate in Parliament, when he consented that: 'The Nisga'a treaty marks a new era of reconciliation and renewal between Canada and aboriginal people. It sets the stage for Canada to realize even greater achievements in the new century.'[139] Blackburn argues that this emphasis on creating a break with the past, as Nault expressed it, is important to the political legitimation of

[134] C. Blackburn, *Producing Legitimacy,* p. 624.
[135] R. Perry, *From Time Immemorial,* p. 159.
[136] Ibid., p. 159
[137] C. Blackburn, *Producing Legitimacy,* p. 622.
[138] Ibid., p. 622.
[139] Ibid., p. 626.

reconciliation language.[140] In addition, one can argue that this argument is valid only when such a watershed actually generates a new line in policy.

Whereas Canada is concerned, this seems to have been the case, but in Australia adversely, the modifications to the Native Title Act shortly after the *Mabo* case controversy undermined this political legitimation. The rejection of the UN Committee's claims concerning racism in the native title claims process in Australia confirms this absence of political legitimation, as well as the concerns expressed in the 2010 *Native Title Report*.

Even more so, and perhaps the most significant difference between the processes in Australia and Canada in relation to reconciliation, was the willingness of the respective governments to change existing legislation and to create a framework within which land claims after *Mabo* and the Nisga'a Treaty could be realized. Although in both countries the *Mabo* and Nisga'a cases served as an incentive to change legislation, in Canada the initiative to implement structural changes was the imperative of the federal government, in establishing a Comprehensive Claims policy to deal with land right claims henceforward, whereas in Australia the reluctance of the government after *Mabo* to actually change legislation was evidential in the process afterwards. Thus, whereas in Canada the government seized the Nisga'a process as an opportunity to implement changes to benefit the indigenous population, in Australia the government was essentially forced to change existing structures. Furthermore, when it did change these structures the government ensured the inclusion of such an extensive amount of "obstacles" for obtaining native title, that indigenous people still feel deprived of their rights. Hence, one can argue that with regard to land rights and native title, elements of substantive reconciliation, the steps taken in Canada have created a better ground for reconciliation.

2.4 Practical vs Symbolic Reconciliation: Australian Formal Reconciliation Process and Canadian Compensation Package

Besides the alterations in both countries in legislation concerning native title claims, additional approaches aimed at reconciliation have been chosen by consecutive Australian and Canadian governments. The following paragraphs will discuss the Formal Reconciliation Process in Australia and the approach of Canada in response to the claims of IRS attendees.

2.4.1 CAR and the Australian Formal Reconciliation Process

The concept of reconciliation was mentioned by several players in the Australian political field in the Bicentennial year of 1988, 200 years after the official date of British settlement. One of these players

[140] C. Blackburn., *Producing Legitimacy,* p. 626.

was the then Prime Minister of the Labor-government, Bob Hawke. Prior to Hawke's election in 1983, there had already been discussions between the government and indigenous people concerning a new treaty. This discussion continued under Hawke's Prime Minister-ship: in 1988 Hawke signed an agreement, in accordance with then Minister for Aboriginal Affairs Gerry Hand, which, among other things, spoke of a new treaty of which Aborigines could by and large determine the content.[141] Later that year a resolution was submitted stating that Parliament 'consider it desirable that the Commonwealth negotiate the terms of a compact with Aboriginal and Torres Strait Islander citizens providing recognition of their special place in the Commonwealth of Australia'.[142] However, the reference to a compact was shortly thereafter changed to the phrase that 'the Commonwealth further promote reconciliation'.[143] Eventually, as a result of the government's and main electorate's concerns for state sovereignty, no treaty was established.

Nevertheless, the idea of a reconciliation-focused approach remained part of Hawke's government policy and translated into a ten year-long Formal Reconciliation Process. The emphasis of this idea of reconciliation, according to then Minister of Aboriginal Affairs Robert Tickner, had to be on practical issues, such as improving socioeconomic conditions, and would address symbolic issues through educating the national community on indigenous issues.[144] In order to fulfill this reconciliation plan, the Council for Aboriginal Reconciliation (CAR) was established through the CAR Act on 2 September 1991. The functions of CAR were threefold: developing an education campaign in order to create awareness concerning indigenous issues, designed in particular for non-indigenous peoples; fostering a national commitment to overcome indigenous socio-economic disadvantages; and exploring the desirability of drawing up a formal document of reconciliation.[145]

Gunstone argues that there was much skepticism and even outright hostility from the indigenous community toward this concept of reconciliation set out by the government, since:

> Reconciliation, as it was set out in the Act, just did not go far enough… [It] did not refer to the hard substantial issues which are about fundamental changes in power relationships and access to and control of productive resources. There was no mention of land rights, self-determination and sovereignty.[146]

[141] A. Gunstone, *Unfinished Business,* p. 26.
[142] Ibid., p. 28.
[143] Ibid.
[144] Ibid., p. 30.
[145] Ibid., p. 34.
[146] Ibid., p. 45.

This was felt even stronger because the CAR Act followed the rejection of an earlier pledged treaty, which would have been a substantive change. Hence, when instead the indigenous community was presented with a formal reconciliation process that did not address most of their needs, the disappointment many felt was twice as large.[147]

Hunter and Schwab underline this fact, in stating that in the first five years of the Formal Reconciliation Process the labour-government of Keating focused mainly on symbolic issues, such as educating the national community, whereas in 1996 under the new liberal government of John Howard the focus shifted to practical reconciliation: education, housing, health and employment.[148] However, the manner in which these practical issues were addressed by the Howard-government had, according to both Hunter and Schwab as to Gunstone, assimilationist characteristics. This critique was also voiced by the then indigenous Social Justice Commissioner.[149] In addition, in spite of Howard's public commitment to practical reconciliation, his government by and large failed to develop effective programs to achieve this goal: indigenous socioeconomic conditions were by no means altered at the end of the Reconciliation Process.

Gunstone argues, thus, that this ten-year long formal reconciliation process failed. The failure sprung from several issues, yet Gunstone appoints as key factor the respective government's failure to acknowledge that a reconciliation process should address substantive issues, such as land rights and self-determination and even a treaty, as well. [150] Even more so, as the introduction of this thesis has argued, a reconciliation process requires the input of both parties, the victims and the victimizers. The Formal Reconciliation Process failed to reflect on the broad range of indigenous views and did not incorporate the issues most important to many indigenous peoples.

2.4.2 Canada: accounting for the IRS system

In Canada dialogue regarding government accountability for historical injustice against indigenous people commenced around the same period, in 1990, when leaders of the Assembly of First Nations publicly discussed residential schools abuses for the first time.[151] The claims and lawsuits that followed ultimately 'forced the government to undertake an alternate strategy to resolve the injustices of residential schooling'.[152] From 2007 onward, the Canadian government thus installed a

[147] A. Gunstone, *Unfinished Business,* p. 45.
[148] B.H. Hunter and R.G. Schwab, (2003), "Practical Reconciliation and Continuing Disadvantage in Indigenous Education", in: *The Drawing Board: An Australian Review of Public Affairs*, Vol. 4, No. 2, November 2003, pp. 83-98, p. 86.
[149] See: Gunstone, p. 218. ; Hunter & Schwab, p. 86.
[150] A. Gunstone, *Unfinished Business,* p. 299-301.
[151] A. Woolford, *Governing Through Repair,* p. 16.
[152] Ibid.

compensation program, initiated a Truth and Reconciliation Commission and offered an official apology, which will be discussed further in paragraph 2.5.

With regard to financial compensation, a deal was reached on 8 May 2006 generally referred to as the Indian Residential School Settlement Agreement. The agreement entailed that firstly, every individual who had ever attended a residential school could register for so-called 'common experience payments,' which included $10.000 for the first year followed by $3.000 annually thereafter. Secondly, it entailed an 'Independent Assessment Process' through which victims of sexual abuse or other physical abuses can claim up to $275.000. Lastly, the compensation package included collective reparations, adding $125 million to the earlier designated budget of $ 350 million of the Aboriginal Healing Foundation, designed to facilitate community-based healing projects, as well as $60 million for the erection of a Truth and Reconciliation Commission and $20 million for community commemorative projects.[153]

The Indian Residential School Truth and Reconciliation Commission (TRC) did not open its doors until 8 April 2010. This late start was the result of a conflict between the initial commissioners of the TRC. Nevertheless, the TRC is currently commissioned by both indigenous as non-indigenous commissioners. The TRC mandate includes creating a public historical record, which can serve for education purposes, as well as making recommendations. The TRC was furthermore erected, as other TRC's, in order to acknowledge and witness the IRS experience and promoting nationwide awareness of the IRS legacy.[154]

As Woolford states, the financial compensation scheme as well as the erection of the TRC show that remedy for historical wrongs is underway in Canada, arguably more so than in Australia. Yet, indigenous critique has arisen with regard to both the Canadian compensation scheme as the TRC. The common experience payments for starters, do not properly address the cultural harm of the schooling experiences. Furthermore, the application of an IAP payment is a very complex and extensive process within which the applicant needs to provide various forms of proof as well as go through several hearings which have the potential of furthering traumatization. One survivor expressed: 'I have to continue to suffer through my pain while the government looks over my case to determine if I'm telling the truth. … [Throwing] money is just another way for them to wipe their hands of this country's blotched history.'[155] Nevertheless, as Malcontent points out, the value of

[153] A. Woolford, *Governing Through Repair,* p. 16-18.
[154] K. Stanton, "Canada's Truth and Reconciliation Commission: Settling the past?", in: *The international indigenous policy journal*, vol. 2, iss. 3: Truth and Reconciliation, art. 2, p. 4.
[155] Richard Courchene in A. Woolford, *Governing Through Repair,* p. 21.

financial compensation lies in the fact that it sends a message to victims that they are being righted and thereby included in the political community.[156]

Indigenous skepticism with regard to the TRC focuses on the erection of the TRC out of litigation, whereas other truth commissions are generally instigated by a new regime to investigate harm inflicted by a past regime. The TRC conversely, 'was not created out of a groundswell of concern about IRS survivors by the public; rather it was agreed to by their government's legal advisers in order to settle costly litigation.'[157] It has been voiced, therefore, that the TRC would probably not have been established were it not for the enormous financial cost to the government of continuing against the pile of individual indigenous claims.[158]

With regard to reconciliation, thus, the TRC and the compensation scheme have mainly addressed symbolic issues. The approach did and does not entail any programs aimed at improving indigenous conditions of health, education and other socioeconomic conditions, nor has it addressed any substantive issues. Furthermore, Jung poses that the concept of reconciliation is 'underspecified in the context of the Canadian TRC.'[159] Moreover, there seems to be a lack of indigenous views on both the TRC as the compensation scheme from a reconciliation point of view. It is likely that this hiatus is caused by the relatively short time-span of this approach.

Nevertheless, as Kim Stanton poses, 'one of the most important things a truth commission can do is to engage the wider public with its work'. [160] She states in this regard that there is a lack of knowledge of the IRS system under the majority of the Canadian population, and there is no consensus under non-indigenous Canadians as to the scope of injustice the IRS system has caused. She therefore argues that the creation of a public, historical record by the TRC can proof to be highly valuable for national education purposes. [161] The TRC can in that respect provide a tool which contributes to a reconciliation process, since this requires the engagement of the entire society.

As the TRC, the financial compensation scheme should perhaps be viewed as an additional measure in a broader reconciliation process. Thus, although neither the financial compensation package nor the TRC in Canada have yet led to reconciliation, they can be considered steps in the right direction. In Australia adversely, as paragraph 2.4.1 has pointed out, such steps have been lacking. There is no equivalent of a TRC in Australia, and although indigenous people qualify for a

[156] P. Malcontent, "Financial Compensation for Victims of International Crimes as a Political Process", in: Cedric Reyngaert (ed.), *The Effectiveness of Transitional Justice,* (Antwerp, Oxford, Portland, 2009), pp. 240-241.
[157] K. Stanton, *Canada's Truth and Reconciliation Commission*, p. 5.
[158] Ibid.
[159] C. Jung, (2009), "Transitional justice for indigenous people in a non-transitional society", ICTJ Research Brief, 18 March, 2009, p. 11.
[160] K. Stanton, *Canada's Truth and reconciliation Commission,* p. 8
[161] Ibid., pp. 6-7.

range of welfare payments, this is distinctly different from receiving financial compensation for injustice done in the past, something that has not occurred in Australia.

2.5 Symbolic reconciliation: formal apologies and legitimation criteria

A form of restorative justice which can help achieve symbolic reconciliation is a formal apology from the government for injustice done in the past. The United Nations General Assembly Resolution 60/147 states that 'victims of gross violations of international human rights laws and serious violation of international humanitarian law' have the right to some form of restorative justice or a remedy. According to the Resolution, remedies can include 'Public apology, including acknowledgement of the facts and acceptance of responsibility' as well as 'verification of the facts and full public disclosure of the truth.'[162] According to Rhoda Howard-Hassman, corporate entities such as governments are often reluctant to offer such apologies, since they argue that they are not personally responsible for harm inflicted in the past.[163] Nevertheless, she states that 'one can argue that while guilt, or fault, is an attribute held by an individual only if she has actually committed a harmful act, responsibility is another matter.'[164] Furthermore, she argues that official apologies can contribute to achieving reconciliation, since one of the functions of official apologies is to restore the dignity and worth of the group that has been wronged. Concurrently, the apology serves an educational function. If the apology is then supported by a broad public, 'there is a greater chance for societal reconciliation.'[165]

According to Howard-Hassman, the contributing of an official apology to a reconciliation process is largest when the official apology is consistent with a core set of definitional attributes. These attributes include 'establishment and acknowledgement of the facts of the case,' thus both the donor of the apology as the recipient agrees on the course of historic events and injustices. Furthermore, 'the donor must also indentify each wrong committed,' so as to achieve full transparency of what the apology is for as well as responsibility for the scope of the injustice. Moreover, the donor 'must accept full responsibility for the injustice, thereby ridding the recipients of any feelings that perhaps they inflicted the harm upon their selves.' Finally, by showing genuine remorse and regret, the donor must show the sincerity of the apology.[166] When all these

[162] General Assembly of the UN, "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights laws and serious violations of international humanitarian law," GA resolution, 60/147, 16-12-2005, section V, section, VIII, Article 22e, 22b and 23.
[163] R. Howard-Hassman, (2010), "Official Apologies", Paper written for the conference entitled *Facing the Past: International Conference on the Effectiveness of Remedies for Grave Historical Injustices*, (Utrecht, 2010), p. 2.
[164] Ibid., p. 3.
[165] Ibid., p. 7.
[166] Ibid., p. 10.

requirements are met, Howard-Hassman is optimistic about the effects official apologies can have on a reconciliation process.

Corntassel however argues that when indigenous peoples are involved, official apologies will never be able to achieve reconciliation since they are 'state-centered strategies' or rather, 'state-dominated reconciliation processes,' and therefore do not offer sufficient attention to the indigenous perspective. He states: 'To conceive an apology or a truth and reconciliation commission as a way for polities to neutralize a history of wrongs is to set it up to fail for indigenous peoples and to neglect an opportunity for transforming existing relationships that go beyond hollow, symbolic gestures.'[167] Nevertheless, one could argue that the symbolism of an official apology can in itself contribute to reconciliation.

In both Australia and Canada, official government apologies have been offered to the indigenous population. The following paragraphs will assess both apologies and to what extent these have affected the reconciliation processes.

2.5.1 Canadian apologies

In Canada, in chorus with the closing of the last residential school in 1996, the first claims of residential school attendees began to pile up. Concurrently, the *Final Report* of the Royal Commission on Aboriginal Peoples (RACP) initiated a public investigation into the abuse and violence that had taken place on residential schools. The findings of this Report in combination with the first 200 litigations from residential school survivors persuaded the Canadian government to make a gesture.[168] This symbolic gesture came on 7 January 1998, when Minister of Indian and Northern Affairs, Jane Stewart and Member of Parliament Ralph Goodale, presented a government plan to address the residential school victims. This plan was named "Gathering Strength: Canada's Aboriginal Action Plan" and was intended as a "Statement of Reconciliation". In this statement, the government of Canada offered an apology but only to those who had become victims of the 'tragedy of sexual and physical abuse at residential schools'.[169] Adversely, the indigenous community granted more importance to those events the government did not apologize for: everything the residential schools had represented.

With regard to this apology Corntassel is correct in concluding that this did not contribute to achieving reconciliation. However, this apology was not consistent with any of the criteria drawn up

[167] J. Corntassel, *Who's sorry now*, p. 2-3.
[168] Ibid., p.8.
[169] Ibid., p. 7-8.

by Howard-Hassman which make an official apology meaningful and thus contributive to the reconciliation process.

Nonetheless, ten years later, in 2008, another attempt was made: On 11 July 2008, Canadian Prime Minister Stephen Harper uttered an official government apology on national television to Canada's indigenous community for its residential school policy. This apology included taking full responsibility for the policy of residential schools, the effects these schools have had on indigenous communities and all the violence and abuse that took place on the schools. Furthermore, Harper acknowledged the policy was initiated in order to 'kill the Indian in the child' and sincerely apologized for this too. Moreover, Harper ushered the promise that 'this will never happen again.'[170] Jason Edwards emphasizes that Harper's aim by apologizing was reconciliation: 'Harper recognized that "an absence of apology has been an impediment to healing and reconciliation" and it was in that spirit that he was issuing a national *mea culpa*.'[171] In light of this statement made by Harper, Edwards argues that through the apology 'Harper instantly positioned his government for better relations with Canada's indigenous populations,' and insists that by apologizing, 'Canada could begin to close one "sad chapter" of history, while also creating a new beginning between the Canadian government and its First Nations that would lead to "healing and reconciliation" between both groups.'[172]

Analyzing Harper's apology based on the criteria Howard-Hassman provides for a meaningful government apology, one can establish that whereas the Indian residential school era is concerned, Harper's apology showed conformity with all three criteria. Harper established and acknowledged the facts, the first criterion, by stating in the opening of his speech that:

> Two primary objectives of the Indian Residential School System were to remove and isolate Aboriginal children from the influence from home, families, traditions and cultures in order to assimilate them into mainstream society. This was based on the assumption that aboriginal cultures and spiritual beliefs were inferior […].

Harper does not, however, state specifically that he or his government takes full responsibility for the harm done in the past, which Howard-Hassman distinguishes as criterion two. However, he does emphasize that the IRS system was instigated by government initiatives and general assumptions of superiority for which he does specifically apologize:

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[170] PM Harper, Statement of Apology, 11 June 2008, Ottawa, Ontario, via: Department of Aboriginal Affairs and Northern Development Canada http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf, 11-06-2011

[171] J. Edwards,(2010) "Apologizing for the Past for a Better Future: Collective Apologies in theUnited States, Australia, and Canada", in: *Southern Communication Journal*, Vol. 75, No. 1, pp. 57-75, p. 62.

[172] Ibid.

> Today we recognize that this policy of assimilation was wrong, has caused great harm and has no place in our country. […]The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. […]The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language[173].

Finally, Harper expresses the sincerity of the apology at the end of his speech, by saying: 'The Government of Canada sincerely apologizes and asks the forgiveness of the Aboriginal people of this country for failing them so profoundly.'[174]

The apology was hailed by indigenous leaders throughout the nation. Assembly of First Nations Chief Phil Fontaine was the first to make a public statement and mentioned a 'new dawn in race relations' and a 'spirit of reconciliation'. Inuit leader Mary Simon concurrently said she believed 'a new day has dawned' and Metis leader Clement Chartier expressed his belief in the sincerity of the apology.[175]

Paulette Regan conversely argues that for many indigenous people in Canada, the apology was simply 'too little, too late.'[176] Furthermore, the phrase that 'this must never happen again,' has in other historical contexts and situations proven to be a hollow one. For these reasons, Regan considers the apology not as the closing of what many non-indigenous Canadians refer to as a regrettable chapter in history, but rather 'as an opening for all Canadians to fundamentally rethink our past and its implications for our present and future relations.'[177] This statement was echoed by Shawn Atleo, Assembly of First Nations Regional Chief: 'We're grabbing onto some hope that it will

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[173] PM Harper, Statement of Apology, 11 June 2008, Ottawa, Ontario, via: Department of Aboriginal Affairs and Northern Development Canada http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/rqpi_apo_pdf_1322167347706_eng.pdf, 11-06-2011
[174] Ibid.
[175] *Aboriginal Leaders hail public apology*, via: http://www.canada.com/vancouversun/news/story.html?id=18133d91-b8aa-4fbe-956e-20298d79c1d5
[176] P. Regan, (2010), *Unsettling the Settler Within: Indian Residential Schools, Truth-telling and Reconciliation in Canada,* (UBC Press, Vancouver, 2010), p. 3.
[177] Ibid., p. 4.

be a moment that will lead to a better tomorrow, that the general populace is finally going to be made aware of those severely disruptive policies over generations.'[178]

2.5.2 Australian apology

Howard-Hassmann argues that the apology offered to the indigenous people of Australia by Prime Minister Kevin Rudd in 2008 had a larger symbolic meaning, since it was one of the first statements Rudd made after taking office. This gesture has been deemed even more meaningful because Rudd's labor-government followed the liberal government of John Howard, who had essentially annulled every indigenous attempt to achieve some form of self-determination and had thereby, according to many, effectively reversed the reconciliation process.[179] Concurrently, Rudd´s apology was also relatively coherent to Howard-Hassmann's three criteria. The facts of injustice were established and acknowledged by Rudd in stating that 'the laws and policies of successive parliaments and governments have inflicted profound grief, suffering and loss on these, our fellow Australians.' He accepted the responsibility for these laws and policies by apologizing on behalf of the government of Australia. He specifically addressed the apology to the victims of the Stolen Generations. Finally, Rudd expressed the sincerity of the apology by stating that the apology is offered 'in spirit of the healing of the nation,' as well as by saying that: 'We today take the first step by acknowledging the past and laying claim to a future that embraces all Australians. […] A future were this parliament resolves that the injustices of the past must never, never happen again.'[180]

Albeit the symbolic meaning of the Australian apology, Corntassel voices a critique with regard to the detachment of the apology from any possibility of reparations to the Aborigines. Corntassel states in this respect that many victims of the Stolen Generations policies have requested financial compensation, but the government had made very clear prior to offering the apology that it would not set up a financial compensation scheme. Nevertheless, indigenous reaction shortly after the apology was optimistic. Mick Dodson for instance voiced his optimism: 'I am inspired by this apology as an act of true reconciliation towards indigenous Australia'.[181]

It appears, thus, that in Australia as well as in Canada the apologies were welcomed by the respective indigenous communities, but that skepticism about the actual impact of the apologies on the reconciliation process remains. Despite the fact that the apologies in both the countries marked a

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[178] *Aboriginal Leaders hail public apology*, via: http://www.canada.com/vancouversun/news/story.html?id=18133d91-b8aa-4fbe-956e-20298d79c1d5
[179] See: M. Hinkson and J. Altman, *Coercive Reconciliation*
[180] Apology PM Kevin Rudd, via: http://www.youtube.com/watch?v=b3TZOGpG6cM, 07-06-2011
[181] M. Dodson, via: http://www.creativespirits.info/aboriginalculture/politics/stolen-generations-sorry-apology.html

watershed in national truth-telling about the past in acknowledging that former governments and parliaments have in fact inflicted harm and grief upon the indigenous communities, the apologies alone are not enough. Moreover, although both of the apologies were relatively coherent to Howard-Hassmann's criteria of a meaningful apology, both apologies made only a specific notion of the grief caused by the policies that led to the Stolen Generations (in Australia) and the Indian residential schools (in Canada). The apologies did not involve taking full responsibility for other acts by settlers or government that inflicted harm on the indigenous communities. Hence, although the apologies were meaningful, one might argue that they were not extensive enough.

Additionally, Corntassel provides that in both cases, 'the premium that state officials placed on maintaining absolute political and legal authority over indigenous peoples made it impossible for them to offer genuine apologies and so made it impossible for them to initiate a process of genuine reconciliation'.[182]

Drawing a comparison between the two apologies, it does not appear that one has made a more significant contribution to reconciliation than the other. Nonetheless, the apologies did create a willingness in the indigenous community to reopen the dialogue between government and indigenous groups on the one hand, and the necessity for all non-indigenous peoples to rethink their history and their own role as settler society on the other. They can in that respect, thus, be considered as contributive to the reconciliation processes, yet, as the TRC and financial compensation scheme in Canada, in a complementary matter in combination with significant structural changes that address substantive issues. The apologies are important, but their importance lies primarily in the symbolic sphere and the apologies alone will not prompt reconciliation. Currently, several years since the apologies have been offered, it seems that relevant follow up has indeed been lacking and the apologies have therefore not prompted the indigenous forgiveness they aimed to achieve.[183]

2.6 Substantive Reconciliation: Self-determination

To what extent then, have substantive matters as self-determination and self-government been addressed in Australia and Canada? The following paragraphs will discuss these much contested concepts, the indigenous and governmental perspective and the importance of self-determination with regard to reconciliation.

[182] J. Corntassel, *Who's Sorry Now?,* p. 15.
[183] P. Sutton, *The Politics of Suffering,* p. 197

In the words of James Tully, 'the right of self-determination is, on any plausible account of its contested criteria, the right of a people to govern themselves by their own laws and exercise jurisdiction over their territories'.[184] This right is recognized by the international community. As provided in paragraph 2.1, the United Nations Declaration on the Rights of Indigenous Peoples is by far the most controversial in its decree on self-determination for indigenous peoples, as well as the most specific in defining this much-debated concept. Namely, Article 3 states that 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[185] Article 4 provides that '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'.[186] However, as paragraph 2.1 has shown as well, many states, including Australia and Canada, were and are reluctant to sign and honor the Declaration precisely because of the reference made to self-determination. Successive governments of both the nation-states have claimed to fear that granting self-determination to minority groups can lead to claims of secession or threats to the state's sovereignty or national cohesion and unity.[187]

Nevertheless, for the indigenous community self-determination is a principle that is intrinsically linked to reconciliation. Legal historian Robert Williams, former board member of the Working Group on Indigenous Peoples, remarked in 1990 that 'International legal recognition of the right of indigenous people to self-determination as distinct peoples has been the most strident and persistently declared demand voiced before the Working Group.'[188] In addition, Maivan Lam, professor of International Law, provides that indigenous people in unison agree on the necessity to become legitimate actors in international society, in which they need to become subjects and not objects: 'They need to achieve international legal personality, which the unqualified recognition of their right to self-determination would in principle confer.'[189] Furthermore, Mick Dodson provides:

> It is from within the context of profound disrespect for our culture, identity, difference and integrity, that our call for self-determination is uttered with such a passionate sense of

[184] J. Tully, "The Struggles of Indigenous Peoples for and of Freedom", in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (New York: Cambridge University Press, 2000), p. 57.
[185] http://www.un.org/esa/socdev/unpfii/en/drip.html, Article 3, 20-06-2011
[186] http://www.un.org/esa/socdev/unpfii/en/drip.html, Article 4, 20-06-2011
[187] See: M. Ivanitz, *Democracy and Indigenous Self-Determination*
[188] R.A. Williams, (1990), "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World", in: *Duke Law Journal*, Vol. 4, 1990, p. 663.
[189] M.C. Lam, (2000), *At the Edge of the State: Indigenous Peoples and Self-determination*, (New York, 2000), p. 59.

> urgency. Indigenous peoples from all over the world have made it perfectly clear that the right to self-determination is the most fundamental of our rights as peoples. Self-determination is to peoples what freedom is to individuals; the very basis of their existence.[190]

These sentiments are echoed by both Australian Human Rights and Equal Opportunity Commission (HREOC) as the – now dissolved – Aboriginal and Torres Strait Islander Commission (ATSIC) who both stress the importance of self-determination in overcoming paternalistic government policies[191] as the positive effects self-determination will impel on indigenous self-esteem, both equally important for the achievement of substantive reconciliation. To emphasize this further ATSIC has stated that: 'There is no right more fundamental for indigenous people than that of self-determination.'[192]

The following paragraphs will explore the steps taken by the indigenous communities of Australia and Canada and subsequently the approaches of both the governments to this complicated claim. However, before doing so it is necessary to examine the distinction between self-determination and self-government, as well as between internal and external self-determination.

2.6.1 External vs internal self-determination

Initially the concept of self-determination encompassed the idea that national groups could secede from the sovereignty of the nation-state in order to form their own national state. However, the definition was swiftly narrowed down by international law and legal documents to ensure that national sovereignty of the state would overrule such claims. Ivanitz states that at present the concept of self-determination is understood to have an external and an internal form. She argues that: 'Whereas the first "external" form comprises radical, nationalist movements that seek secession, the other is more moderate and seeks autonomy within the nation-state.'[193] What, then, is the difference between self-determination and self-government? Many authors use the term loosely for the same concept or notion, but in the broader context of achieving reconciliation it is important to make a distinction between the two.

Although there are many similarities between the two concepts, perhaps the most accurate way to distinguish between the two is by regarding self-determination as an abstract idea, of which

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[190] M.C. Lam, (2000), *At the Edge of the State: Indigenous Peoples and Self-determination*, (New York, 2000), p. 22.
[191] *Bringing them home,* Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, HREOC, Commonwealth of Australia, 1997, p. 277.
[192] ATSIC, *Annual Report 1994-1995*, p. 29.
[193] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 122.

self-government is the implementation method. Wayne Warry describes this as follows: 'If we regard self-determination as a process that arbitrarily began with Aboriginal reactions against government policies in the 1960s, which continues today in the form of increasing self-reliance, self-definition, and self-sufficiency, self-government can be viewed as the end result of this process.'[194] This definition of indigenous self-government consists of a few key elements: 'a territorially defined land base under Aboriginal jurisdiction, a population which controls its own membership, natural resources, a system of government, a prosperous economy, and a legal regime that is free both to maintain traditional or customary law while adapting to changing circumstances.'[195]

A critical factor in both the internal form of self-determination as indigenous self-government is that the autonomy of the indigenous group and the mechanisms and institutions of the Aboriginal government operate within the legal framework of the Constitution and within the powers exercised by the government of the nation-state they inhabit.[196]

2.6.2 Indigenous perspective on self-determination

In assessing the Aborigines' claim for self-determination, it is relevant to distinguish whether this claim implies external or internal self-determination. Surely, it is important to underline that Indigenous aspirations for self-determination do not necessarily mean that Aborigines aspire to full secession or independence from the state. Acknowledging the different types of self-determination therefore has significant importance for national cohesion and unity, and for the process of reconciliation between indigenous and non-indigenous Australians.

Ivanitz poses that indigenous claims for self-determination generally do not present a serious challenge to national sovereignty and unity. 'For the most part,' she argues, 'they bear little resemblance to those more radical, nationalist movements that seek secession. The exercise of indigenous self-determination is more an expression of internal political autonomy and has become a way of reducing disadvantage.'[197]

An indigenous perspective is presented by Geoff Clarke of the National Coalition of Aboriginal Organizations of Australia when addressing a speech to the ILO in 1988, in which he states: 'We define our rights in terms of self-determination. We are not looking to dismember your states and you know it. But we do insist on the right to control our territory, our resources, the organization of

[194] W. Warry, (1998), *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government,* (University of Toronto Press, 1998), p. 4.
[195] B.W. Morse, (1984), *Aboriginal Self Government in Australia and Canada,* (Institute of Intergovernmental Relations, Kingston, Ontario, 1984) p. 79.
[196] M. Ivanitz, *Democracy and Indigenous Self-determination,* p. 134.
[197] Ibid., p. 133-134.

our societies, our own decision-making institutions, and the maintenance of our cultures and ways of life'.[198] Maivan Lam confirms Clarke's opinion on the indigenous perspective:

> The majority is not seeking to construct their own separate states or, to use terminology favored by governments but repudiated more and more by indigenous persons, they are not seeking to secede. It is not independent statehood that most indigenous peoples seek, but the ability to leverage the international recognition of their right of self-determination into a power to compel states to negotiate with them, on the basis of formal equality, the terms of a partnership that will assure their physical and cultural survival as well as their self-directed development.[199]

Lastly, Australian indigenous lawyer and academic Behrendt, argues that Aboriginal claims seek 'a new relationship with the Australian state with increased self-government and autonomy, not the creation of a new country.'[200] Jane Robbins adds: 'In this perspective, self-determination is formulated as a form of shared sovereignty, in which Indigenous peoples are given a formal sphere of authority in the political system, within the framework of a single nation.'[201] Thus, at the root of indigenous claims for self-determination lies the demand to control their own affairs as well as make their own decisions. According to the *Bringing them Home* Report*,* in practice this entails that self-determination requires more than just the consultation of indigenous peoples by the government in making new policies, since mere consultation does not provide the opportunity to decide on anything, nor does it offer control over results or outcome. Self-determination coherent to the indigenous perspective also requires more than mere participation in policy making, since in a participation model the essence of the policy or service and the ways in which this service is provided have not been determined by Indigenous peoples. Hence, the Report argues: 'Inherent in the right of self-determination is Indigenous decision-making carried through into implementation.'[202] This leads to the relevant distinction between a policy or program designed or freely adopted by indigenous peoples, and a policy or program designed by government about or for indigenous peoples. Whereas

[198] L. van der Vlist, (1994), *Voices of the Earth: Indigenous Peoples, New Partners and the Right to Self-determination in practice*, (Amsterdam, 1994), The Netherlands Centre for Indigenous Peoples, p. 144.
[199] M. Lam, *At the Edge of the State,* p. 59-60.
[200] J. Robbins, (2010), "A Nation within: Indigenous Peoples, Representation and Sovereignty in Australia"*,* in: *Ethnicities,* Vol. 10, Iss. 257, June 2010, p. 259.
[201] Ibid.
[202] *Bringing them home* Report, p. 276.

the latter is a representation of the past and current situation, the former reflects an implementation of self-determination according to the indigenous perspective. [203]

Key in this distinction, according to Cornell, is accountability: when indigenous peoples have genuine decision making power, this will inextricably link decision-makers to the consequences of their decisions. The role of the government herein would be limited to financial and resource support.[204] Substantial elements can thereby also lead to practical reconciliation through the improvement of socioeconomic conditions. Patrick Dodson argues in this regard: 'The recognition, respect and resourcing of indigenous authority by the dominant society is fundamental to dealing with the scourge of grog and drugs that have caused such incomprehensible damage to indigenous communities.'[205]

2.6.3 Self-determination in Canada

Ivanitz states that in Canada three main forms of indigenous political autonomy can be distinguished: regional agreements, Treaty Land Entitlements (TLE) and self-governing territories.[206]

The establishments of regional agreements was enabled through the policy on the Implementation of the Inherent Rights and the Negotiation of Aboriginal Self-Government, 1995, which supports the principle that indigenous people have an inherent right to self-governance based on the fact that sovereignty had not been ceded. This policy denotes autonomy, though not sovereignty in the purest sense of the word, since indigenous governments are required to exercise their rights within the legal framework of the Canadian Constitution and within the powers exercised by the federal government. Nevertheless, the policy entails that certain subject matters are now under exclusive indigenous jurisdiction and are expressed through certain indigenous institutions of governance.[207]

Secondly, Treaty Land Entitlements stipulate the process of fulfilling outstanding treaty obligations on the part of the federal government to bands of First Nations – which in effect are the governments of First Nations reserves – under the Indian Act 1985. The federal government provides significant funding to these First Nations bands, with rights under the Indian Act to acquire additional reserve lands. However, the TLE do not necessarily imply self-government provisions, since this notion is not adopted specifically under the TLE.

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[203] *Bringing them home* Report, pp. 276-277.
[204] S. Cornell, *Indigenous peoples, poverty and self-determination,* p. 19.
[205] See: P. Dodson, *Whatever Happened to Reconciliation?* p. 24.
[206] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 134.
[207] Ibid., p. 134-135

Nevertheless, policies have been implemented which enable bands on reserves to control programs and services as well as the attached funds in areas of health, housing, education and economic development. Several indigenous self-governing institutions are allowed to develop and implement policy, although this has to be done in agreement with provincial and federal government and within existing legislation. Although this system does present these bands with a reasonable amount of political autonomy, many First Nations in this respect maintain that any form of delegated authority is inconsistent with an inherent right of self-government.[208]

Lastly, and most innovatory, is the granting of the self-governing territory of Nunavut, of which the treaty was signed in Iqualit on 25 May 1993. The Nunavut agreement is the biggest land rights agreement signed in Canada, covering about one-fifth of Canada's land mass and a very large marine area as well – all the marine areas adjacent to coastlines and that separate the islands of Arctic Archipelago. The agreement was adopted by a large majority of Inuit in all three regions of Nunavut in November, 1992.'[209] The granting of the land rights over such an extensive land mass was already of a remarkable scope in the indigenous struggle for land rights, but the treaty enabled more than that: from the start of the negotiations in the 1970s, the Inuit – who inhabit the Nunavut territory – have inextricably linked the land rights claim to the creation of a new territory – Nunavut – which should be carved out of the Northwest Territories. With the creation of this territory a new territorial government was also established that would govern Nunavut.

Although the assent of the federal government of the creation of Nunavut and a Nunavut government borders on self-determination for the Inuit, it is not solely aimed at exercising the rights of a certain ethnic group, the Inuit. One of the main conditions of the federal government was that the new Nunavut government would not be allowed to be an Inuit government only, but would have to remain an elected, representative body of the territory's inhabitants. However, since 85 percent of Nunavut's inhabitants are in fact Inuit, in reality the Nunavut government could have the representation and power to incorporate Inuit preferences in its politics. The establishment of Nunavut and the effects this has had on reconciliation in Canada will be explored further in a case study in chapter 3.

2.6.4 Self-determination in Australia

Peter Sutton points out that in Australia a policy shift occurred at the start of the 1970s. Whereas prior to this shift, state, church and private enterprises had imposed a whole range of systems of

[208] Part A, via: http://www.parl.gc.ca/Content/LOP/researchpublications/962-e.htm
[209] J. Dahl, J. Hicks and P. Jull, (2000), *Nunavut: Inuit Regain Control of Their Lands and Their Lives*, (International Working Group for Indigenous Affairs, 2000), p. 11.

control and repression on indigenous communities, this policy was at the start of the 1970s generally replaced by an approach that entailed more 'freedoms' for the indigenous population. This approach, according to Sutton, put an emphasis on community self-management and self-determination. Nevertheless, all administration and bureaucratic institutions concerned with these indigenous communities were still firmly controlled by non-indigenous people.[210] Hence, this does not qualify as self-determination, or even self-government, since this does not, in any way, imply indigenous decision-making carried out into implementation, as Behrendt has argued.

Nevertheless, a change was presented in 1990 when, established through the Aboriginal and Torres Strait Islander Act 1989, the Aboriginal and Torres Strait Islander Commission (ATSIC) was erected. ATSIC has for several years been the most important mechanism in Australia for the establishment of self-determination for indigenous peoples. ATSIC virtually functioned as a government department and was an elected representative body of Aboriginal people, combining both representational as executive responsibilities.[211] Jane Robbins argues that ATSIC, since its erection in 1990, had become an influential mechanism, 'allocating over $1 billion annually for Indigenous programs at the peak of its activity.'[212]

Although in theory ATSIC's Board of Commissioners was supposed to have significant political autonomy in making budgetary decisions, allocations and policy priorities, in reality the (non-indigenous) Minister for Aboriginal Affairs retained a substantive degree of authority and interventionist powers.[213] Moreover, ATSIC attracted much political criticism mainly on allocation of funds – which was said to be colored by kinship obligations – as well as on the relevance of one mechanism for both Aboriginal as Torres Strait Islander people, since there are differences in their socioeconomic conditions. Additionally, critics voiced concerns on the election of ATSIC representatives, since allegedly the election of representatives was for a major part determined by family structures and kinship obligations.[214]

ATSIC was abolished in 2004 under the liberal government of Prime Minister John Howard. For many this confirmed the government's rejection of a policy of self-determination for Aborigines. The reason the government provided for the abolition was that ATSIC had failed in its goals, since it had not managed to significantly alter indigenous socioeconomic conditions. This confirms the views of Hunter and Gunstone, as presented in paragraph 2.4.1, that the Howard-government focused solely on practical elements of reconciliation – although failed to address these properly – and not on

[210] P. Sutton, *The Politics of Suffering,* p. 49-51.
[211] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 137.
[212] J. Robbins, *A Nation within,* p. 258.
[213] M. Ivanitz, *Democracy and Indigenous Self-Determination,* p. 137.
[214] Ibid., p. 138-139.

substantive elements of reconciliation. This is underlined by Robbins, who states that: 'the government also portrayed ATSIC as an undesirable form of political separatism that endangered national unity.'[215]

Hence, in Australia the granting of the limited forms of self-determination and self-government, in the form of ATSIC and the *laissez faire* approach regarding the remote communities from the 1970s onward, has not been coherent to the indigenous claim for self-determination and political autonomy as this thesis has described in paragraph 2.6.2. Patrick Dodson argues in this respect that other countries with a similar British settlement history have taken a different approach: 'New Zealand, Canada and the US have, since the 1970s, committed themselves to a political settlement approach to Indigenous relationships on the basis of recognizing indigenous people's right to self-determination.'[216]

Drawing a comparison between Australia and Canada, Cornell argues that in both countries a significant mismatch between indigenous peoples' ambitions and states' responses continues. While substantive issues as self-determination appear to be fundamentally important for indigenous people in a reconciliation process, both states have been reluctant to address these issues and have instead focused on practical and symbolic issues.[217]

Nevertheless, when assessing the granting of self-government and self-determination in both countries, it seems that Dodson's statement is valid with regard to Canada, which has thus far taken more steps to address these substantive issues than Australia.

Overall, this chapter has demonstrated that while many similarities can be distinguished in approaches, policies and initiatives of the consecutive Australian and Canadian governments, there are also several differences. It appears that most of these differences, be it historical or contemporary, have largely provided Canada with a better foundation on which to build reconciliation with its indigenous peoples. The following chapter will elaborate on this assumption by means of two case studies.

[215] J. Robbins, *A Nation Within,* p. 258.
[216] P. Dodson, (2007), "Whatever Happened to Reconciliation?", in: M. Hinkson & J. Altman, *Coercive Reconciliation*, (Arena Publications Association, Australia, 2007), p. 27-28.
[217] S. Cornell, *Indigenous peoples, poverty and self-determination,* p. 11.

In Nunavut the tide has shifted. Conclusion of the Nunavut Agreement and the creation of the Nunavut Territory and Government, within the lifetimes of those of us who were taken away to regional schools, is proof positive that the strength of the human spirit can overcome the biggest of political obstacles and transcend the most entrenched of cultural prejudices.

Jose Kusugak, 2000

We must ask how the considered and sensitive discussion in "Little Children are Sacred" of the long-term problem of handling sexual abuse, and the culturally meaningful interventions required to address this crisis, have been translated into the storm-trooper tent diplomacy of health providers in battle fatigue. Have the policy playground bullies won the day?

Mick Dodson, 2007

3. Two case studies: Nunavut and the NTER

Chapter two has shown that internal self-determination, in the form of self-government within the nation-state, can encompass key elements necessary for reaching substantive reconciliation: it overcomes paternalistic policies imposed by a non-indigenous government, thereby empowering indigenous peoples and improving their self-esteem. Furthermore, it enables indigenous peoples to design and implement their own initiatives to improve socioeconomic conditions and can thus contribute to practical reconciliation.

Nevertheless, one could conversely argue that it is the responsibility of the government of the nation-state to actively improve indigenous socioeconomic conditions where they are most poignant. The much higher levels of violence, homicide, suicide and abuse in indigenous communities in both countries, are even more painful because they exist in an otherwise "successful" state. One could argue, therefore, that the government has to intervene in order to put things right. These practical elements of reconciliation, according to this theory, should overrule indigenous critique on this 'neo-colonialist' approach.

In order to explore both of these opposing approaches, this chapter will highlight two case studies: the Canadian establishment of the new territory of Nunavut and the Australian 'Northern Territory Emergency Response' better known as the Northern Territory Intervention.

3.1 Nunavut

3.1.1 Creation of Nunavut

A significant part of one of the world's largest countries has fairly recently been returned to the control of its indigenous population: the Inuit peoples of Canada.[218] Prior to the establishment of Nunavut, this area was part of the Northwest Territories. Following the controversial Nisga´a case in

[218] J. Dahl et all., *Nunavut*, p. 12

1973, which opened the native title debate and thus the opportunity for indigenous people to put forward comprehensive land claims, Inuit leaders in the Eastern and Central Arctic of Canada, assembled in the Inuit Tapirisat of Canada (ITC), put forward a claim to the federal government over a vast area of land in the Eastern Arctic.[219] The negotiations entailed a comprehensive land claim in the eastern part of the Northwest Territories. Furthermore, the negotiations included a claim for compensation for past and future use of Inuit lands by non-Inuit. Lastly, and perhaps most importantly, the negotiations concerning the comprehensive land claim have from the start been linked to the demand for an Inuit territory with a new government which would be qualified to safeguard and foster Inuit culture and language and improve socioeconomic conditions.[220] When, after seventeen years of lobbying, the Nunavut claim was granted, the Inuit in effect regained control over approximately one fifth of Canada's land mass and a large marine area.

After nearly twenty years of negotiations, the land claim was ratified through a territorial referendum held on 5 November 1992: 69 percent of the eligible Inuit voters approved the creation of Nunavut. The Nunavut Land Claims Agreement (NLCA) was signed by Inuit and government representatives in Iqaluit on 25 May 1993. 'Finally, in June 1993, Parliament enacted two separate pieces of legislation – the *Nunavut Land Claims Agreement Act* (ratifying the Nunavut land claim settlement), and the *Nunavut Act* (creating a Nunavut territory and a government of Nunavut).'[221] The combination of the two acts enabled the establishment of a new territory covering a little over 2 million square kilometers, 350.000 of which henceforth would fall under collective Inuit title. In addition, the federal government agreed to a funding compensation package – conform Inuit claims for the (unauthorized) use of their lands in the past– of $1.14 Billion to be paid out over 14 years.[222] The creation of Nunavut and the land claims settlement associated with it are the result of the largest of Canada's modern treaties.[223]

A critical aspect in the negotiations concerning Nunavut and the eventual signing of the Nunavut Agreement and thereby establishment of the territory, was the form of the new government. The Inuit claim entailed a territory in which Inuit culture, language and traditions would be echoed by its government. However, the final accord reached between the Inuit negotiators and the Canadian federal government stipulated that Nunavut would be governed by a public government, as opposed to an ethnic government which would solely allow Inuit to stand for office.

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[219] D. Wall, (1998), "Aboriginal Self-Government: The Cases of Nunavut and the Alberta Metis Settlements", in: Ed. D. Long & O.P. Dickason, *Visions of the Heart: Aboriginal Issues in Canada*, (Harcourtbrace, Toronto, 1999), p. 8.
[220] Dahl et all, *Nunavut,* p. 54.
[221] Ibid., p. 56-57.
[222] See: D. Wall, *Aboriginal Self-Government;* Dahl et all., *Nunavut.*
[223] M. Ivanitz, *Democracy and Indigenous Self-Determination*, p. 136.

By insisting on a public government the federal government honored all Nunavut's inhabitants, though roughly 85% percent of these inhabitants are Inuit, which in theory enables the Inuit to make up the majority of government representation.[224]

Dahl underlines this factor in the establishment of Nunavut: '

> Under this public government approach all residents – both indigenous as non-indigenous – could vote, run for office and otherwise participate in public affairs and the government's jurisdiction and activities would extend to all residents. In other words, Nunavut would in principle have a government like those of the provinces and territories, rather than following the 'indigenous self-government' model under which only indigenous people would participate in government or be eligible for its programs and services.[225]

Albeit its public government, Nunavut does represent a unique form of indigenous self-government. Titus Allooloo, a member of the NWT Legislative Assembly, stated in 1989: 'We dream of making laws and policies which truly reflect the needs and conditions of Nunavut Territory ...' [226] In saying this - despite putting it delicately – he nevertheless implied: '… the needs and conditions of the Inuit.'[227] Through the creation of Nunavut this goal has become much more realistic: whereas in the NWT (to which Nunavut previously belonged) the Inuit made up a mere 38% of the territory's population, in Nunavut they make up 85%.[228] Nunavut, thus, enables its Inuit inhabitants through their collectively held lands and their government to accommodate Inuit preferences and interests. Nunavut, thus, presented a unique opportunity of empowerment for the Inuit inhabitants. Sentiments along these lines were voiced by Inuit spokespersons upon the birth of Nunavut: 'Long-held aspirations of self-determination will finally be realized on this historic date. Economic growth coupled with a return to traditional Inuit values have finally become optional long-term goals'.[229]

Today, 13 years after the creation of Nunavut, it is relevant to look at the results and prospects of the initiative. One would assume that the creation of Nunavut and the fostering of Inuit needs and demands through its government would present new opportunities for reconciliation between Canada's indigenous and non-indigenous population. Besides assessing the impact Nunavut

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[224] Dahl et all., *Nunavut*, p. 54.
[225] Ibid.
[226] D. Wall, *Aboriginal Self-Government*, p. 9.
[227] Ibid.
[228] Dahl et all*., Nunavut*, p. 54.
[229] Indigenous perspective derived from indigenous forum, via: http://www.culturalsurvival.org/ourpublications/csq/article/nunavut-territory-established-inuit-gain-new-homeland-april-1

has had on symbolic and substantive reconciliation, it is relevant to assess whether Nunavut has created new opportunities in order to address practical issues as well, in overcoming Inuit socioeconomic disadvantages and whether it will continue to do so in the future, or whether instead it has merely widened the gap between indigenous and non-indigenous peoples in Canada. The following paragraph will discuss the opportunities and benefits the creation of Nunavut presented.

3.1.2 Opportunities and benefits

With regard to symbolic reconciliation, the creation of Nunavut represented a victory for indigenous people. After decades of negotiating and lobbying the Inuit were granted the political recognition they had fought for. Nunavut was a distinct turning point in government policy, as opposed to the former patronizing, neo-colonial approach. [230] The magnitude of this change has, arguably, been contributive to symbolic reconciliation. This assumption is underlined by Shauna Labman, who stated:

> For those participants gaining their first insight into Nunavut, the dialogue was inclusive and inspiring. Outsiders were almost overwhelmed by the sense and strength of community, culture, and identity that were conveyed by the people who fought for decades for their still-newly-acquired territorial status.[231]

But Nunavut entailed much more than a symbolic victory for the Inuit. Jose Kusugak, one of Nunavut's former most prominent Inuit politicians and lobbyists, posed that the opportunities Nunavut provided were the following:

- Firstly, it provides the Inuit with a set of property rights – land ownership, royalties, access to wildlife, capital transfer, and so on – which can move Inuit forward on the road back to economic self-sufficiency.
- Secondly, the Nunavut government has established set of joint Inuit and government resource management boards that can do two things:

  -Safeguard fundamental conservation development proposals; and,

  -in combination with Inuit property rights, these boards promote external resource developers that successful projects would require having Inuit on side.

[230] S.G. Alcalay, "Nunavut Territory Established: Inuit Gain New Homeland April 1", in: *Cutlural Survival Quarterly*, Iss. 23.1, via: http://www.culturalsurvival.org/ourpublications/csq/article/nunavut-territory-established-inuit-gain-new-homeland-april-1

[231] S. Labman, Reaction to "Is Nunavut Really a Failing State?", in: *The Mark*, 22 August 2011, online available via: http://www.themarknews.com/articles/6469-is-nunavut-really-a-failing-state/2/

- Thirdly, it provides a constitutionally-protected guarantee of a separate Nunavut Territory and Government, through which the Inuit, in democratic partnership with other residents, will be able to shape public life and services to make these more compatible with their unique social and cultural characteristics.[232]

This leads to the assumption that the opportunities with regard to reconciliation Nunavut presented were threefold: Firstly, Nunavut would, through the symbolic victory it presented, significantly alter the relationship between Inuit and non-Inuit as well as Inuit and the federal government, thereby aiding the reconciliation process. Secondly, the substantive elements the Nunavut agreement entailed, such as the land rights granted and the self-governing opportunities, provide Inuit with the power to safeguard their culture and language as well as, thirdly, address practical issues such as the socioeconomic conditions.

This unison of substantive and practical issues through self-determination is consistent with the desires of most indigenous people, since, as quoted earlier in chapter 2, Maivan Lam argues that self-determination translates into 'terms of a partnership that will assure physical and cultural survival as well as self-directed development'.[233] The presumption that substantive measures as self-government and political autonomy for indigenous peoples will also benefit practical issues as improvement of socioeconomic conditions are furthermore echoed by Steven Cornell, who poses that self-determination could provide a necessary element in the struggle against poverty.[234]

With regard to Nunavut, there are several assumptions which underline Cornell's statement. Firstly, through an Inuit majority representation in the Nunavut government, decision- and policy making reflects Indigenous agendas and knowledge, enhancing the likelihood that solutions to problems will be appropriate and informed as well as supported by the state's population, and, thus, viable. Secondly, it places development resources in Inuit hands, allowing a more efficient use of those resources to meet Inuit objectives. Thirdly, it raises engagement of the state's inhabitants in economic and community development. Lastly — and arguably most importantly — the possibility to elect an Inuit majority into government shifts accountability.[235] A shift in accountability entails that henceforth Inuit are responsible for developing and executing policies and programs concerning their own people.

Thus, all of the above mentioned factors lead to the assumption that Nunavut has presented opportunities and benefits with regard to symbolic, practical and substantive reconciliation. The

[232] Dahl et all., *Nunavut*, pp. 24-26.
[233] M. Lam, *At the Edge of the State*, p. 60.
[234] S. Cornell, *Indigenous Peoples, Poverty and Self-Determination,* p. 18.
[235] Ibid., p. 23.

following paragraph will discuss some of the challenges Nunavut has dealt with in its short existence as well as the current situation and both indigenous as non-indigenous views.

3.1.3 Challenges and critique

Despite the optimistic views upon creation of Nunavut and the opportunities the new territory presented, Cornell posed that 'a shift in jurisdictional power is in itself no guarantee of sustainable development; it merely makes such development possible.'[236] Regarding Nunavut, critique and concerns have been voiced with regard to the current socioeconomic conditions of many of its inhabitants.

For starters, following a wave of violence and murder in one of Nunavut's communities Cape Dorset in 2011, Patrick White of Canadian newspaper *The Globe and Mail* published a critical article titled "The Trials of Nunavut: Lament for an Arctic Nation". The article reflects on the situation in Nunavut twelve years after the territory´s establishment, and the findings are not particularly positive. White notes that the rate of violent crime per capita is seven times higher in Nunavut than in the rest of Canada, while the homicide rate is roughly 1000 per cent the Canadian average. Furthermore, he observes that the number of crimes reported to the police has increased – has more than doubled even – since the birth of the territory.[237] This is underlined by statistics published by the Nunavut Bureau of Statistics concerning violent crime, which can be viewed in Appendix 1.[238] According to White, Nunavut's crime statistics are comparable to those of Mexico or South Africa.

In addition to the significantly higher crime rate in Nunavut, suicide rates of Inuit males aged 15 – 24 are 40 times that of the Canadian average, the Inuit child abuse rate is ten times the national average and the Inuit unemployment rate is far above the national average. Remarkable in this aspect is that while the ideal of Nunavut on its creation was that the state would accommodate Inuit interests and thereby benefit the Inuit populace of Nunavut, the unemployment rate of Inuit in Nunavut is higher than that of non-Inuit in Nunavut.[239] Concurrently, while Inuit socioeconomic conditions in Nunavut have apparently not taken any drastic turns to improvement and the unemployment rates remain high, 50 per cent of social worker positions remain vacant, as White points out. With regard to government representation, furthermore, White points out that while in theory this should mirror Nunavut's population, of which 85% is Inuit, in effect Inuit's representation

[236] S. Cornell, *Indigenous Peoples. Poverty and Self-Determination* p. 22
[237] P. White, "The Trials of Nunavut: Lament for an Arctic Nation", in: *The Globe and Mail*, 1 April 2011, available online via: http://www.theglobeandmail.com/news/national/nunavut/the-trials-of-nunavut-lament-for-an-arctic-nation/article547265/
[238] http://www.eia.gov.nu.ca/stats/stats.html
[239] http://www.eia.gov.nu.ca/stats/labour.html

in Nunavut's government is a mere 50% because there are simply not enough educated Inuit people to fill the positions. [240]

In his article White furthermore argues that not only does Nunavut cope with a whole range of physical violence issues, the territory is also struggling to meet its inhabitants basic needs as housing, food and education. White therefore reaches the conclusion that Nunavut can be regarded a failed state. Similar concerns are voiced by Jack Hicks, who states that research has pointed out that in 2007 close to 70% of Inuit preschoolers in Nunavut reside in households rated as 'food insecure' and that overall in Nunavut 56% of children deal with regular food insecurity.[241] This is the result, according to Howard and Widdowson, of Nunavut's economic reality which has been dramatic from the outset: 'high living expenses, a lack of job skills, the absence of markets, difficulty in obtaining raw resources and extreme transportation costs, this forms the economic reality in Nunavut.' [242]

In addition to the social problems Nunavut struggles with, the economic prosperity Kusugak had hoped for seems not to have been realized either. The creation of Nunavut was based on an economy of subsistence, in which a main part of its inhabitants live as hunter-gatherers. Although this lifestyle is part of the Inuit culture Nunavut was meant to preserve, it does not present many economic opportunities to make a state profitable or even self-sufficient, which shows in the fact that 95% of Nunavut's funding comes from the Federal government. According to Cornell, this is a logic result of Nunavut's demographic assets: 'Indian and Eskimo nations located in remote regions or on very small land bases face narrower economic opportunity sets than those faced by Indian nations located near large metropolitan areas.'[243]

Yet, upon creation of Nunavut supporters, both indigenous as non-indigenous, expressed strong beliefs in the opportunities Nunavut would create in overcoming socioeconomic disadvantage, which it clearly has not. Drawing from the statistics, then, one can conclude that the creation of Nunavut thus far has not been contributive to achieving practical reconciliation.

The same conclusion has been reached by many media, as shown in the articles in the Globe and Mail and The Mark. As mentioned in this paragraph, much critique has been voiced on Nunavut's economic viability and there is a general lack of trust in Nunavut's future prospects. The current

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[240] P. White, "The Trials of Nunavut: Lament for an Arctic Nation", in: *The Globe and Mail*, 1 April 2011, available online via: http://www.theglobeandmail.com/news/national/nunavut/the-trials-of-nunavut-lament-for-an-arctic-nation/article547265/

[241] J. Hicks, (2012), *Aglukka'q's Shameful Response to UN Food Envoy*, 23 May 2012, available online via: http://www.northernpublicaffairs.ca/index/hicks-aglukkaqs-shameful-response-to-un-food-envoy/#more-1373

[242] E. Howard and F. Widdowson, (1999) "The Disaser of Nunavut", in: *Options Politiques*, July-August 1999, p. 58-59.

[243] S. Cornell, *Indigenous Peoples, Poverty and Self-Determination,* p. 26.

paradigm displays a lack of trust in Nunavut's governing abilities and thus works counterproductive in the reconciliation process. The symbolic and substantive issues which were addressed by the creation of Nunavut, have thus far not resulted in a sustainable approach backed by Canada's entire (non-indigenous) population, which, as this thesis has argued, is a requirement for sustainable reconciliation.

3.1.4 Transitional timeframe

In order to analyze the legitimacy of the critiques voiced, it is necessary to shortly elaborate on the culture of subsistence most Inuit in Nunavut live by. George Wenzel, who as an anthropologist has studied Inuit subsistence, states that this way of life entails 'a system of social relationships in which material-economic actions (of which the hunting to be sure is the most apparent activity) are organized by the same principles that generally govern the day-to-day interpersonal conduct of participants and, thus, reinforce a broadly held set of cultural values'.[244] In other words, the culture of subsistence is designed to foresee in the basic needs (such as food, clothing and housing) of a community, and thus touches upon community structures and relationships with regard to how supplies and resources are distributed. Cultural relationships and social responsibility of all participants are thus crucial to maintain this system. However, as Wenzel argues, herein lies the difficulty in overcoming Nunavut's socioeconomic disadvantages: Crime and substance abuse caused by cultural deprivation through many assimilationist government policies prior to the creation of Nunavut, have destroyed the social responsibility necessary to collectively improve socioeconomic conditions, be it through the maintaining of a subsistent culture or through the development of new economic opportunities.[245]

It is in light of this information, then, that the relatively short existence of Nunavut should be viewed. Albeit the lack of improvement in socioeconomic conditions thus far, Peter Jull has argued that the indigenous self-government model of Nunavut has contributed to social peace and regional equity, factors which can in time breach the downward spiral that is the socioeconomic reality of Nunavut.[246]

The emphasis here should perhaps be on the words 'in time', which with regard to Nunavut have been echoed by others. Journalist Tim Querengesser for instance notes, in response to White's article in *The Globe and Mail*, that ten year is much too short a timeframe after which to appoint a state as failed. He furthermore argues that Nunavut should be allowed to take matters into its own

[244] G. Wenzel, in: *Nunavut: Inuit regain control over their lands and their lives*, p. 181
[245] Ibid., p. 181-182.
[246] P. Jull, (2002), "Nunavut: The Still Small Voice of Indigenous Self-Govenance", in: *Indigenous Affairs*, Vol. 3, Iss. 1.: Self-Determination, (International Woring Group for Indigenous Affairs, 2002), pp. 42-51, p. 50.

hands and learn from its mistakes, instead of following Ottawa's direction every time a challenge present itself, which is hardly self-government. 'Nunavut's success will,' according to Querengesser, 'hinge on its ability to break free from looking to governments in Ottawa or Iqaluit for answers. Nunavut, like all states requiring outside assistance, needs a culture of innovation that accepts development-project failure, and learns from it. That won't happen in projects led by government.'[247]

Jim Bell, editor of Nunatsiaq news, expresses similar views. He states that while currently Nunavut struggles with the effects of rural poverty and ignorance, economic development is in the cards: 'The mining industry, over the next decade or so, is expected to create many hundreds of new jobs in Nunavut.' He furthermore states that such investments in Nunavut are attracted by the territory's indisputable political stability. [248] Geoff Green moreover adds that while there are many people in Nunavut who are helping to shape a brighter future, 'this will take time and, unfortunately, a lot of hard work, pain, and suffering'. Nevertheless, he points out that a positive changes is underway, channeled through new initiatives like the National Strategy for Inuit Education, announced in June 2011. Such initiatives, according to Green, are promising examples of effective leadership, and of fundamental stepping stones that are required for practical elements of reconciliation to be addressed.

Lastly, then, Cornell states that when federal governments are willing to allow time for a learning curve for indigenous self-governing initiatives, decision quality is bound to improve. Furthemore, he poses:

> For generations, authority of indigenous peoples has rested with non-indigenous governments, which have seldom been held accountable to the indigenous peoples they have governed. This divorce between those with the authority to make decisions and those bearing the consequences of those decisions has resulted in an extraordinary and continuing record of central government policy failure.[249]

Perhaps, thus, the indigenous self-governing territory that is Nunavut – which has already proved its worth with regard to contributing to symbolic and substantive reconciliation – should be allowed a bit more time to address practical issues as well, before a non-indigenous government, which has

[247] T. Querengesser, Reaction to P. White, *The Mark,* August 22, 2011, available online via: http://www.themarknews.com/articles/6469-is-nunavut-really-a-failing-state/2/
[248] G. Green, Reaction to P. White, *The Mark,* August 22, 2011, available online via: http://www.themarknews.com/articles/6469-is-nunavut-really-a-failing-state/2/
[249] S. Cornell, *Indigenous Peoples, Poverty and Self-Determination,* p. 23.

done no better job overcoming indigenous socioeconomic disadvantage in the past, takes back these self-governing rights so valuable to Nunavut's inhabitants.

3.2 Australia: The Northern Territory Emergency Response

3.2.1 Remote communities in the NT: a story of decline

The Australian Bureau of Statistics estimates that roughly 25 percent of Australia's Aboriginal population lives in remote communities in the Northern Territory and Western Australia.[250] Similar to communities in Nunavut, these remote Aboriginal communities deal with a whole range of socio-economic problems: violence, homicide, suicide, poor health, (sexual) abuse and alcohol and substance abuse. In addition, most communities do not have sufficient or proper housing, education levels are low and there is a general lack of basic institutions, guidance, justice, and no sense of purpose under the communities' inhabitants. Although these issues have existed for several decades, in most communities the situation has not improved, has worsened even, and thus far this downward spiral has not been broken.

In order to put into perspective the steps taken by the Howard-government in 2007, it is necessary to shortly analyze the causes of this downward spiral. A first contributive factor to this decline emerged around 1970, when the government, church and private corporations generally started abandoning systems of control and repression formerly imposed on Indigenous peoples. This policy shift brought an approach focused on the communal, corporate and collective, based on a concept of self-determination in combination with an emphasis on non-interference in indigenous affairs, customs and thus, effectively, communities.[251] As a result, most Indigenous communities were on paper still controlled by the state, though in effect the communities only occasionally dealt with indirect administrative control. Peter Sutton notes on this matter that in everyday life, this generally accounted to 'a covert policy of *laissez-faire* towards the quality of local community life'.[252] This sudden release of external control, in most communities led to a vacuum in responsibility and a feeling of abandonment.[253]

A second factor, which also surfaced around 1970, was the collapse of pastoral employment after the government enforced equal wages for Aboriginal stock workers.[254] Whereas prior to this decision many Aboriginal people had found employment on cattle stations, the enforcement of equal

[250] http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter210Oct+2010
[251] P. Sutton, *The Politics of Suffering,* p. 58.
[252] Ibid., p. 49.
[253] Ibid., p. 50.
[254] Ibid., p. 53

wages led many of the farmers to hire non-indigenous workers instead. In addition, the increased mechanization of farm labor reduced Aboriginal job opportunities even further. The many Aboriginal workers who lost their jobs to these developments, often did not have the means, transportation or will to travel back to their home regions and became concentrated in artificial townships and fringe settlements.[255]

Simultaneously, access to alcohol and other drugs increased, due partly to demographic shifts but also to the extension of drinking rights to Indigenous people in the late 1960s. Concurrently, passive welfare by the government increased, thereby effectively funding the intensification of alcohol and other substance-abuse related problems.[256]

Throughout the 1990s the situation in the communities as well as the then existing programs to target remedial violence were evaluated by several scholars, who not only discovered that the situation in the communities had become alarming at best but also that out of the 130 active programs only six had received an reasonable evaluation published in a documented form.[257] The funder and coordinator of these programs was ATSIC, which has led Sutton to believe that ATSIC's negligence in coordination, but more importantly in bringing this to attention of the federal government and wider public has been part of the reason for the government's abolition of ATSIC. From 1999 onwards both media as government reports revealed more and more disturbing accounts of downward spiraling quality of life in the communities[258]. The 2007 *Little Children are Sacred Report* was the final and most disturbing of these pile of reports which brought the alarming situation to the attention of all.

It is in this light then, that the Northern Territory Emergency Response – or more commonly known as Northern Territory Intervention – should be viewed.

3.2.2 The Intervention

On 15 June 2007 the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse released the *Ampe Akelyeremane Meke Mekarle,* or *Little Children are Sacred* report.[259] The main finding of the report was that sexual abuse of Aboriginal children was (and is) a widespread and serious problem throughout many of the remote communities, and that (at the

[255] P. Sutton, *The Politics of Suffering*, p. 53.
[256] Ibid., p. 55.
[257] Ibid., p. 73
[258] Ibid., p.7.
[259] http://www.inquirysaac.nt.gov.au/report_summary.html

time) existing government programs needed to work better, needed more available funds and needed to be more long-term in order to overcome the serious issues.[260]

In answer to this report then Prime Minister Howard and Minister for Indigenous Affairs Mal Brough announced a National Emergency and stated that they were going to prioritize the issue of ongoing violence in the communities and shortly thereafter launched the so-called Northern Territory Emergency Response (NTER), which by the media and general public was soon renamed the Northern Territory Intervention. The Commonwealth introduced a set of measures which would apply to all people living in remote Aboriginal communities in the Northern Territory. The measures introduced were the following:

- Extensive alcohol restrictions
- Significant reforms in the welfare system, in order to prevent people using welfare funds to buy alcohol and other substances and ensure the money would be used for the right purpose
- Linking family assistance and income support to school attendance, as well as charging the parents for children's school meals whether they attend or not – to enforce school attendance
- Compulsory health checks for Aboriginal children
- Procurement of townships by the federal government by means of five-year leases, in exchange for "just-terms compensation", meaning an amount of money would be granted to compensate for the loss of land
- Increase of police officers and patrols
- Cleaning and repairing of communities in order to improve the safety and health
- Improving housing and community living conditions, as well as introducing market-based rents
- Banning the possession of pornography, including the auditing of publicly funded computers in order to track down illegal material
- Abolition of the permit system for road corridors, airstrips and other common areas
- Dismantling the Community Development Employment Projects (CDEP)-scheme
- Improving governance through the appointment of managers of government business in the communities[261]

Implementation of these measures was to be facilitated through police and the army.

This drastic move by the Australian Commonwealth presented a dramatic new development in Aboriginal affairs, which has been by and large continued to this day. Though slightly amended

[260] http://www.inquirysaac.nt.gov.au/report_summary.html
[261] Brough, M., Media Release, 21 June 2007.

when Kevin Rudd of the Australian Labor Party became Prime Minister in 2008, most measures have been under Rudd "Closing the Gap" campaign and his successor Julia Gillard "Stronger Futures" policy.[262]

3.2.3 Critique and concerns

'Opinion, both indigenous and otherwise, was extremely divided over the Intervention.'[263]The NTER has drawn widespread support from both indigenous as non-indigenous Australians, but has also caused frustration, anger and despondency among the majority of indigenous peoples living in the Northern Territory.

The most voiced critique – from both indigenous as non-indigenous Australians as well as from the international community – concerns the exemption from the Racial Discrimination Act 1975. According to the critics, Part 4 of the Northern Territory Emergency Response Act, which covers the 'acquisition of lands, titles and interests in land', was undermining important principles and parameters with regard to land rights, in particular the measure of compulsory acquisition of prescribed communities and the measure which concerns the partial abolition of the permit system.[264] The suspension of the RDA was felt even stronger since Australia is still one of a very small pool of countries – and the only western one – that does not have a bill of rights, as mentioned in paragraph 2.2.1. Hence, since there is no constitutional guarantee that safeguards indigenous people from racial discrimination, the fact that the Act that should safeguard that, the RDA, was suspended without any further notice caused widespread concern and anger.

The suspension of the RDA in lieu of the NTER measures enabled the implementation of legislation targeted at one specific race of people: the Aborigines. The measures did not leave room for exceptions or individually adjusted treatment, instead it targeted all Aboriginal residents of remote communities. Since the welfare costs, new controls and land tenure reforms applied to all Aboriginal residents, the NTER implied, according to Hinkson, that all Aboriginal residents of remote townships are irresponsible parents and carers.[265]

Critiques on the suspension of the RDA and the implemented measures did not only come from within Australia. In 2009 United Nations Special Rapporteur James Anaya visited Australia to assess the situation of Human Rights and freedoms for indigenous peoples in Australia, and made the following statement with regard to the NTER at the end of his visit: '[Some of] these measures

[262] Department of Families, Housing, Community Services and Indigenous Affairs, via: http://www.indigenous.gov.au/no-category/stronger-futures-in-the-northern-territory/
[263] P. Sutton, *The Politics of Suffering,* p. 9.
[264] See, among others: P. Dodson, M. Dodson and T. Rowse in *Coercive Reconciliation.*
[265] M. Hinkson and J. Altman, *Coercive Reconciliation,* p. 5.

overtly discriminate against Aboriginal peoples, infringe their right of self-determination and stigmatize already stigmatized communities.'[266] Albeit the fact that Anaya acknowledged that action in Aboriginal communities is required, he furthermore noted:

> Any such measure must be […] with due regard of the rights of indigenous peoples to self-determination and to be free from racial discrimination and indignity. […] The Emergency Response is incompatible with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, treaties to which Australia is a party, as well as incompatible with the Declaration on the Rights of Indigenous Peoples, to which Australia has affirmed its support.[267]

Another critique voiced was that the NTER was presented as a direct response to the *Little Children are Sacred Report*, but that some of the measures were not relevant to the cause of putting an end to sexual abuse of Aboriginal children. Tim Rowse states on this matter that 'imposed land tenure reform is not only an abrogation of "right" but also not obviously relevant to relieving the pressure on women, children or youth of family violence and sexual predation by adults.'[268] The implementation of the NTER is by some perceived, therefore, as a government strategy to regain more control over land instead as an approach to actually target the issues remote Aboriginal communities deal with on a daily basis.[269]

This concern is echoed by Jon Altman and Melinda Hinkson who question the motivation of the federal government in implementing the measures of the NTER, since they addressed none of the recommendations drawn up in the *Little Children are Sacred* Report.[270] More specifically, the Report stressed the importance of consulting the indigenous community in the design of programs: 'In the first recommendation, we have specifically referred to the critical importance of governments committing to genuine consultation with Aboriginal people in designing initiatives for Aboriginal communities.'[271] Nonetheless, the NTER was announced six days later, without any consultation with

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[266] UN human rights envoy Anaya: NT intervention is racist, in: The Australian, 28 August 2009.
[267] Ibid.
[268] T. Rowse, "The National Emergency and Indigenous Jurisdictions", in: *Coercive Reconciliation,* p. 59.
[269] A. Nicholson, 2010. *Human Rights, The NT Intervention and The Racial Discrimination Act,* An Address to the Annual General Meeting Social Policy Connections Forum, 1 December 2010. p. 6
[270] J. Altman and M. Hinkson (eds.), *Coercive reconciliation,* p. IX
[271] *Little Children are Sacred* Report, online available via: http://www.nt.gov.au/dcm/inquirysaac_final_report.pdf

indigenous people, and, despite significant protests, the Act which enabled the NTER was tabled and passed by parliament without any amendments.[272]

3.2.4 Support for the NTER

Notwithstanding the many negative reactions to the NTER, some positive reactions were voiced as well. Firstly, while many agree that imposing measures on a certain ethnic group by making them exempt for a Racial Discrimination Act they would otherwise breach is simply wrong, Sutton raises the question whether these 'considerations of justice' are truly more important than 'considerations of care'.[273] Sutton explains this by expressing his astonishment of the critique of many Australians, both indigenous as non-indigenous, on the NTER:

> It is remarkable how many people living in the comfort, affluence and healthy surroundings of Australia's suburbia have, in the debates over indigenous policy and especially over the Intervention, covertly promoted the view that respect for cultural differences and racially defined political autonomy takes precedence over a child's basic human right to have love, wellbeing and safety. It is as if political feelings and political values are more important than one's emotional feelings and moral values as fellows of those other human beings in the ghettos.[274]

According to Sutton, 'it is not a state unless it has a duty to act for all',[275] and the government should thus do everything in its power to address the issues in the communities. On the scope of the NTER, which Hinkson among others views as proof of the government's hidden agenda, Sutton states that 'the government had to make some dramatic impact in an area where it is hard to get results'. [276]

Sutton's statements by and large echo the sentiments expressed by Noel Pearson at the time the government announced the NTER. Pearson, an Aboriginal Australian lawyer, lands rights activist and founder and director of the Cape York Institute which promotes social and economic development of Cape York (Queensland), is known both for his work and lobbying for Aboriginal rights and development as for his controversial involvement in the NTER. He was one of the first to voice his support for the NTER, and stated in an interview:

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[272] Nicholson, A., (2010), *Human Rights, The NT Intervention and The Racial Discrimination Act,* An Address to the Annual General Meeting Social Policy Connections Forum, 1 December 2010, p. 7.
[273] P. Sutton, *The Politics of Suffering,* p. 11.
[274] Ibid., p. 10-11.
[275] Ibid., p. 197.
[276] Ibid., p. 9.

> You know, I hear people bleat uphill and down about self-determination and in my view self-determination is about people taking responsibility for themselves, for their own families and for their communities and, you know, it's an absolutely shameful hour that has descended on us, absolutely shameful hour where even an emergency intervention to protect the safety of our children is hindered, is hindered by people who supposedly have good will for Aboriginal people and in fact, those people are willing, they are willing the protection and succour to Aboriginal children to [fail].[277]

Pearson furthermore argues that the situation in which welfare money is mostly used to fuel substance addiction and gambling had to be put to a stop: 'the day has come when there is an end to when you as adult can abuse the money that you get, don't use it for the benefit of the kids, use it for drinking, gambling and drugs and create living hell for your children. That day has got to come to an end.'[278]

3.2.5 Evaluation of the NTER

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) has from 2007 onward released half yearly monitoring reports on the process and results of the NTER, later renamed "Closing the Gap in the Northern Territory" and currently known as the "Stronger Futures" policy.[279] In 2011, four years after the implementation of the NTER measures, FaHCSIA released the *NTER Evaluation Report*. A team of researchers involved over 1300 people living in 16 different communities in the Northern Territory in a survey that tested community safety, in order to find out whether indigenous people in the communities perceived their lives and living conditions better, worse or the same as before the NTER.

Over all, the tables presented in the report (see Appendix 4) paint a relatively optimistic picture. According to the survey, night patrolling, additional police and the establishment of safe houses have contributed to an increased sense of safety in the communities. Lindsay Murdoch underlines these survey results with positive responses from the indigenous communities as well. She quotes Bess Nungarrayi Price, from the community of Yuendumu in the central desert, who strongly supports the intervention, particularly on the subject of extra police: 'More crime is being

[277] N. Pearson, ABC News Lateline interview with Leigh Sales, 26 June 2007, via: http://www.abc.net.au/lateline/content/2007/s1962844.htm
[278] Ibid.
[279] Department of Families, Housing, Community Services and Indigenous Affairs, via: http://www.indigenous.gov.au/no-category/stronger-futures-in-the-northern-territory/

reported. There has also been a much needed focus on education and housing.' According to Murdoch, Price elaborates on the topic of income management as well, which, according to her, has resulted in children and women being much healthier than before: 'It's been a life saver. Weekends are always a difficult time, but there is money for food. Women also have a say over how registered stores spend profits and the quality of food sold.'[280]

Albeit the findings of the *Evaluation Report* and the support voiced by Price, critics note that when looking at hard data, not much has changed and some issues have worsened since the start of the NTER. Jon Altman notes that currently reportage and convictions of alcohol, substance abuse and drug-related incidents are up, as are reportage and convictions of sexual assault and child abuse.

However, this does not necessarily mean that the number of crimes has increased. Although the number of domestic violence incidents reported continues to increase, with a 23% increase between 2010 and 2011, this increase is likely to have been influenced by the introduction of the mandatory reporting of domestic violence incidents since 2009.[281] Nevertheless, Altman argues that attempted suicides have increased as well.[282] The 2011 July to December *Closing the Gap Monitoring Report* states on this matter: 'There are concerns that suicide rates have increased in the Northern Territory in recent years. The total number of Indigenous suicides in the NT in 2010 (24) was lower than in 2007 (29) and is at the same level as it was in 2004. There is no obvious trend in the data in recent years.'[283] In spite of the survey results presented in the *Evaluation Report,* when drawing from current hard statistics one cannot legitimately conclude that practical issues of reconciliation have been addressed.

In addition, the majority of the indigenous population concerned by the measures remains negative toward the NTER and successive policies. Recent complaints include that new houses built in the communities, as promised by the NTER announcement, are the ones for non-indigenous government officials. Furthermore, when the promised refurbishment of a number of homes was finally announced, more than three years after the start of the NTER, it was announced simultaneously that the rent of said homes would quadruple after the action would be completed.[284] Moreover, Lindsay Murdoch reports complaints regarding the abolition of the CDEP scheme. According to Murdoch, elders from the Laynhapuy region have deemed the winding back of the Community Development Employment Projects, which were designed to provide income support in

[280] L. Murdoch, "Disputed Territory", in: *Sydney Morning Herald*, 21 May 2011, via: http://www.smh.com.au/national/disputed-territory-20110520-1ewrz.html
[281] C*losing the Gap Monitoring R*eport 2011, p. 20
[282] J. Altman, *NT Intervention 3 years on: A Disturbing Progress Report*, 27 June 2010, via: http://www.greenleft.org.au/node/44584
[283] July to December 2011 Closing the Gap Monitoring Report, p. 6.
[284] L. Murdoch, "Disputed Territory".

exchange for work in the communities, the worst predicament of the NTER: 'People's incentives to earn money, assume higher responsibility, acquire skills and have a relationship with an employer have been destroyed.'[285] Accountability has thereby thus shifted back to external players, which can, according to Cornell's theory, work counterproductive for achieving practical reconciliation.

Yet, the most voiced critique, from both indigenous as non-indigenous, remains that the imposed measures are racially discriminating, patronizing and thereby disempowering indigenous people in the remote communities. Hence, according to these critiques, the NTER has worked counterproductive toward symbolic and substantive reconciliation as well.

3.3 Nunavut VS NTER

This thesis has argued that for sustainable, meaningful reconciliation to be achieved, symbolic, practical and substantive issues need to be addressed.

As the case studies have demonstrated, Canada has through the creation of Nunavut and all it entailed, been much more advanced in addressing symbolic and substantive aspects of reconciliation than Australia. The establishment of Nunavut entailed a symbolic victory for the Inuit people, one they had been negotiating for close to thirty years. The creation of the territory and the new government, have enabled Inuit to prioritize certain aspects of Inuit culture and incorporate these aspects in government policy. The traditional ways of life, as well as professions as hunting and gathering have been safeguarded, and Inuit language and culture are being taught at schools throughout Nunavut. The fact that they have, through Nunavut, regained their lands and regained control over their lives, has been very empowering and has presented incentives to do better and improve.

However, the current Nunavut government is thus far unable to cope with the ongoing – and in some regions worsening – socioeconomic issues, and has thus not addressed practical elements of reconciliation. One could argue in this respect that the Nunavut government has for too long ignored existing problems and has used the funds, received from the federal government, for the wrong issues. If the Nunavut territory would still have been part of the Northwest Territories and thus have a different government in which Inuit would most likely not make up a majority, funds would perhaps have been distributed differently and would perhaps have been spent more 'wisely'. But then again, perhaps not. Taking into consideration that the socioeconomic conditions have not improved under federal government rule in the era prior to establishment of Nunavut, it is not likely

[285] L. Murdoch, "Disputed Territory".

that practical reconciliation in Nunavut would have been better addressed under a different, non-indigenous government.

Nonetheless, consistent with Cornell view on self-determination as a means of overcoming indigenous poverty, one of the main targets of the creation of Nunavut was that the empowerment and accountability it would provide through the symbolic and substantive assets of the creation, would serve as an incentive to improve practical issues, which thus far it has not.

Nevertheless, it is important in this regard to take into consideration the timeframe of a transition. Nunavut is a very young territory, with a relatively inexperienced government, dealing with extreme and complicated issues. Issues which have not been resolved by numerous of federal government policies in the past. Perhaps the territory and government should thus be allowed a bit more time to learn from mistakes and come up with constructive new initiatives to improve the territory in the future. It is however quite possible that it will take another ten or twenty or thirty years before significant results will be presented.

Still, one could argue that the Canadian federal government is lacking in responsibility to protect its citizens, and thus does not actively pursue reconciliation by improving indigenous living standards. As mentioned in paragraph 3.2.2, those who support the NTER in Australia argue in this regard that it is a state responsibility to care for all its citizens, particularly the vulnerable, and that thus the addressing of shrining practical issues should prevail over the indigenous desires to see symbolic and/or substantive matters addressed first. The NTER measures, thus, were implemented from a focus on practical reconciliation, namely, addressing the sexual abuse of children in remote indigenous communities in the Northern Territory, as well as general socioeconomic conditions.

Supporters in addition argue that symbolic gestures in order to achieve reconciliation do not prevent acts of abuse and violence, nor, apparent from the Nunavut case, does self-government. One could therefore argue that the government, by imposing the NTER measures, was acting from a state's responsibility to significantly alter the living situation of the Aborigines in Australia's remote northern communities, thereby creating better circumstances for achieving reconciliation.

However, although a survey has been held under indigenous people living in the said communities which showed that over all these people feel the communities are safer now than before the implementation of the NTER measures, hard statistics show neither a significant improvement in socioeconomic conditions nor a decrease in sexual abuse of children. Hence, the NTER has not resulted in the practical reconciliation it aimed to establish.

Furthermore, the exemption of the NTER measures of the Racial Discrimination Act has infuriated many, and many have argued that this exemption was not necessary in order to protect the children. The same has been argued about the measures concerning land leases and the permit

system. Much critique was also expressed by both indigenous as non-indigenous Australians on the manner in which the legislation, which enabled the NTER, was passed and implemented – without any consultation with the indigenous people living in the communities concerned and thereby ignoring one of the key points of the Report it claimed to answer to.

Arguably, the timeframe argument is valid with regard to the NTER as well, in the sense that perhaps it is too early to assess whether the NTER measures will benefit practical reconciliation. The observation that the NTER was implemented without any consultation with indigenous peoples however, underlines the lack of dialogue and consultation of both opposing parties, and presents a persistent obstacle on the path toward reconciliation in Australia. The NTER entails a policy and a set of measures which are strictly government imposed, top-down, which is inherently incongruous with the concept of reconciliation. Furthermore, not only did the NTER not address symbolic or substantive issues, it also nullified and retracted some of the substantive and symbolic elements that had been granted in the past, such as land rights and leases and the permit system.

Thus, whereas Nunavut addressed both symbolic and substantive issues through negotiation and dialogue between the two opposing parties, the NTER represented a top-down government imposed approach aimed at practical reconciliation, which it has not achieved.

The question remains whether similar initiatives could benefit the other nation-state. Or rather, whether the creation of a self-governing territory as Nunavut could be established in Australia, and whether Nunavut would benefit with an approach similar to the NTER.

However, when taking this into consideration one must bear in mind the different geopolitical factors in both countries. For instance, the Inuit are by and large concentrated in the same region, whereas in Australia the indigenous communities are further apart. Still, granting the indigenous communities more political autonomy and self-governing rights might, through the addressing of symbolic and substantive issues, provide an incentive for practical issues to be addressed as well. However, creating opportunities for economic prosperity in the remote Aboriginal communities of Australia will most likely prove even more difficult than in Canada, due to the barren landscape and the transportation difficulties.

Moreover, taking into consideration the indigenous disapproval of the NTER, one can question the desirability of a similar approach in Nunavut, even more so since the NTER has not yet proven that it will indeed address practical issues.

This, again, portrays the importance of cooperation and ongoing dialogue between indigenous peoples in both countries and their federal governments and non-indigenous citizens. Only when the two parties meet and cooperate, can initiatives be designed that will truly lead to reconciliation.

Conclusion

Against the backdrop of transitional justice this thesis has attempted to shed some light on the complex issue of reconciliation between indigenous peoples and the government, as well as between indigenous and non-indigenous inhabitants, in two nation-states which have arisen out of settler colonialism: Australia and Canada. Besides many commonalities in early interactions between indigenous and non-indigenous people in both countries, consecutive governments of the nation-states have in the past implemented similar policies, many of which have, in retrospect, caused much harm and suffering to the respective indigenous populations. As a result, indigenous peoples in both nation-states to this day cope with severe socioeconomic disadvantages, which is in sharp contrast with the thriving prospects and wealth of the nation-states they inhabit.

The inability of respective governments to alter indigenous socioeconomic conditions presents an obstacle on the path toward reconciliation, but there are many other factors which hinder a meaningful process of reconciliation and thus a sustainable transformation in both nation-states. Albeit the fact that reconciliation is a highly complex concept and therefore difficult to measure, reconciliation can be considered the ultimate goal of transitional justice, and it is herein that the importance of this comparative assessment lies.

The main question this thesis has attempted to answer, is to what extent Australia and Canada can benefit from each other's experiences with regard to achieving reconciliation with their indigenous populations. In order to form an answer to that question, this thesis has assessed whether one can distinguish relevant differences in the countries' approaches and if so, what these are; whether and to what extent separate approaches have actually generated reconciliation; and to what extent supposed successes from one nation-state can be applicable in the geopolitical sphere of the other nation-state. In order to assess the concept of reconciliation in this respect, this thesis has fragmented the concept in three elements: symbolic, practical and substantive reconciliation, which have been tested on the most relevant initiatives, policies and approaches that have been implemented in Australia and Canada in the recent past.

Chapter one has firstly analyzed what commonalities and differences can be distinguished with regard to historical background. The chapter found as most relevant difference in the early interaction between settlers and the countries indigenous populations, that whereas in Australia the settlers applied the *terra nullius* doctrine and thus effectively denied the existence of the Aborigines, the Canadian settlers engaged in dialogues and even treaty-making with Canada's indigenous peoples. Albeit the fact that most of these treaties did inflict suffering upon Canada's indigenous people, to have been acknowledged and deprived of rights provides a better ground for future

reconciliation than to have been regarded as non-existent, as has happened to the Australian Aborigines.

Chapter two, in assessing more recent interaction and policies, has shown that this dynamic has by and large been continued throughout the reign of consecutive governments in Australia and Canada. The chapter analyzed several of the most relevant and influential initiatives and approaches that have been implemented over the course of several years and found that, despite many commonalities between the countries, there are in fact several distinct differences, which are relevant for a reconciliation process.

Firstly, in spite of the commonalities in attitude of both countries regarding international conventions and declarations, the Canadian early structural framework of treaty-making with the indigenous people has led to the entrenchment of indigenous rights in the Canadian Constitution. This is in sharp contrast to the situation in Australia, which does not have a Bill of Rights in its Constitution, and thus provides no guarantee of protection of indigenous rights.

Furthermore, the legislation changes concerning Native Title following the *Mabo* and *Nisga'a* cases, underline the differences in attitude toward indigenous peoples in both countries: whereas in Canada the federal government by and large used the Nisga'a treaty as an imperative to change legislation, in Australia the government felt obligated to change legislation because of a decision of the High Court. However, the reluctance of the Australian federal government showed clearly from the amendments to the legislation made shortly afterwards, which benefited non-indigenous land-owners. Chapter two has argued therefore, that the Canadian approach, in dealing with these land rights claims and legislation changes, has created a better foundation for future reconciliation, touching upon substantive elements of reconciliation.

Moreover, chapter two has demonstrated that while the consecutive Canadian governments have focused on symbolic and substantive elements of reconciliation, the Australian focus has been predominantly on practical elements of reconciliation. This thesis has argued that all three elements are of importance. Yet, the Australian approach, as illustrated in paragraph 2.4, of the Formal reconciliation Process, in effect limited opportunities for substantive and symbolic reconciliation, against indigenous desires, and in the end failed to address practical issues. The Canadian approach, entailing a financial compensation package combined with the erection of a Truth and Reconciliation, has however proven difficult to assess: there appears to be a hiatus in evaluative literature – perhaps caused by the relatively short existence of both measures. Nevertheless, the paragraph has argued that both the TRC as the compensation scheme can prove beneficial to the reconciliation process because they hold the power to address symbolic measures. The creation of a public historic record

by the TRC is herein the most important contribution, since it is designed to create national awareness necessary for reconciliation.

With regard to symbolic elements furthermore, have both countries yielded a relatively similar approach concerning official apologies. The governments of both countries have offered apologies to their indigenous populations, mechanisms addressing symbolic issues. With regard to both these apologies, they have been given symbolic meaning and were well received by the majority of the respective indigenous populations, and can therefore be considered contributive to the reconciliation process. However, this will only be meaningful if substantive and practical matters are addressed in the follow up. Thus far, neither of the apologies has prompted indigenous forgiveness, necessary for reconciliation.

Lastly, chapter two has discussed the approaches of both countries in addressing substantive reconciliation, which can be achieved through the granting of forms of self-determination to indigenous peoples. The chapter has illustrated that Canada has been much more advanced than Australia in this regard: whereas in Canada three forms of indigenous political autonomy are currently in place, in Australia the mechanism which most resembled indigenous self-determination, ATSIC, was abolished in 2004 and has not been replaced.

Chapter two has thus shown that significant differences in the approaches of Australia and Canada can be distinguished, and that generally, the Canadian approach has provided a better foundation for reconciliation. However, the fact that not one of said initiatives had been able to address practical issues and overcome the socioeconomic divide between indigenous and non-indigenous in both countries, has led both the Australian as Canadian government to take a drastic turn in policy concerning their indigenous peoples, which this thesis has demonstrated with two case studies in chapter three: Nunavut in Canada and the Northern Territory Emergency Response in Australia.

Whereas the NTER in essence was, and is, a government-imposed, top-down approach aimed at targeting socioeconomic disadvantages in a repressive manner, Nunavut was designed and created through negotiation between indigenous people and the Federal government. The creation of Nunavut thereby addressed symbolic as well as substantive elements of reconciliation: it represented a symbolic victory for the Inuit population, and granted them extensive land rights as well as a form of self-government that enabled them to incorporate Inuit preferences in government policies. Nevertheless, upon creation indigenous inhabitants expressed their confidence in the ability of the new Nunavut government to address practical issues as well, based on the belief that empowering Inuit as well as increasing Inuit accountability – through Nunavut's symbolic and substantive characteristics – would be able to breach the declining socioeconomic conditions of

Nunavut's inhabitants. Thus far however, practical issues have not been addressed, which has prompted concern and critique by non-indigenous Canadians as well as the federal government.

Some argue therefore that the approach taken by the Australian government, as illustrated in the NTER case study, is the right approach since, reconciliation cannot be reached when the results of the historic injustice most felt on a daily basis, the extreme socioeconomic disadvantages of indigenous people, are not addressed. Furthermore, it is a state's responsibility to take care of and protect all its citizens, and addressing the socioeconomic needs of the indigenous people should thus be a government's first priority.

Yet, in assessing these case studies from a reconciliatory point of view, I have argued that the NTER has worked counterproductive. It has firstly, not addressed the practical elements of reconciliation, which it was set out to do; secondly, it has undermined opportunities for symbolic reconciliation, as created by the apology; and thirdly, it has interfered with substantive elements of reconciliation in the procurement of townships and the abolition of the permit system. Furthermore, much indigenous critique has been voiced on the fact that the NTER was designed and implemented without any consultation with the indigenous population. It therefore embodies a government imposed, top-down approach, which is inherently incongruous with reconciliation.

Nunavut conversely, was the result of close to thirty years of negotiations between the federal government and indigenous people. Looking at Canada's history there seems to be a trend in willingness of consecutive Canadian governments to engage in dialogue with Canada's indigenous peoples, a factor which is lacking in Australia. This element of dialogue and of engagement between the government and indigenous peoples is crucial to achieving reconciliation. Nunavut, furthermore, has increased Canada's changes of achieving reconciliation with the Inuit through the symbolic and substantive elements it entails.

Nevertheless, the case study of Nunavut has also illustrated that practical elements need to be addressed in order to achieve sustainable reconciliation. Non-indigenous critique and concern are interpreted by some Inuit as a lack of trust, and can therefore chip away at the symbolic and substantive reconciliatory achievements.

I have argued in this respect that with regard to Nunavut, one should bear in mind the timeframe of a meaningful transition as well as of a process of reconciliation. Arguably, the government of Nunavut should be allowed a bit more time to learn from mistakes and address practical issues, especially since consecutive Canadian federal governments and their policies have not been able to address these issues either.

To conclude, there are several lessons that can be drawn from the comparison between Australia and Canada. Firstly, Canada seems to be further along the path toward reconciliation with its indigenous population than Australia. This is partly due to historical factors such as early encounters and treaties, but mainly because of a general line in policy in the last decades which shows a willingness to enter into dialogue with indigenous peoples and honor their opinion as well as initiatives. Arguably, Australia could benefit from such an approach as well. The NTER case, and in particular the many critiques and concerns voiced by indigenous people with regard to the NTER, show that reconciliation can never be established through a government-imposed policy in which leaves no room for the indigenous perspective.

Secondly, true reconciliation can only be achieved when substantive, symbolic and practical issues are addressed, and only when these are addressed in a manner that is satisfactory to both indigenous people as the government. Furthermore, a national commitment, as well as trust in indigenous policy-making abilities, is necessary to make a reconciliation process sustainable. In both Australia and Canada national awareness and commitment should be improved.

Thirdly, transitions require time. Indigenous engagement and initiatives should be allowed time to improve what consecutive governments have not been able to improve during the entire existence of the nation-states. The case study of Nunavut offers hope, but only time will tell whether the new territory will be granted time to learn from its mistakes. Ultimately, reconciliation comes down to all parties putting aside feelings of guilt, apathy, self-pity and (political) interests, and to shifting the paradigm to one in which optimism is key and cooperation is crucial.

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Appendix