Troubled Space: Tensions in Indigenous and colonial notions of national space

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Wow, what an introduction Chris. Thank you. It the fullest introduction I think I ever had. Tena kotou katoa nga mihi nui nui kia kotou. As Chris said, my name is Jacinta Ruru I whakapa into north island Iwi here, Rokouwa, Ngati ranginui, Ngati Maniapoto. Thank you Holly for the invitation to be here with this conference. It is an honor to be here and to join in these days exploring notions of space and place, which I find very fascinating. So, on the international stage, with the United Nations general Assembly adoption of the Declaration of the Rights of Indigenous Peoples in 2007 rights to indigenous governance cannot be ignored. Eventhough four countries did not initially support the declaration, those four countries being the United States, Canada, Australia and New Zealand, they all changed their stance in 2010 to support the declaration in most of its form. At the heart of the declaration is the urgent need for reconciliation, including creating respectful relationships with indigenous peoples in order to enable our economic, social and cultural development.

This international commitment illustrates the critical importance for indigenous peoples to regain governance responsibilities and relationships with lands and waters. And so my story here begins today, once not that long ago, the significant tracks of land on earth were known only to indigenous peoples. The expansion of the European empire into the new world, of the old homes of indigenous peoples and lands now known as for example the United States of America, Canada or Australia and New Zealand has brought about legal quandaries, that remain mostly unresolved, despite more than 200 years plus of content. So while the European colonialists arrogantly assumed sovereignty of the indigenous lands, they were more mixed in regards to assumptions of ownership of the lands and waters. Some of the English-styled domestic courts recognized indigenous peoples property tenure, but typically only at occupancy use-rights scale, if at all. This was often justified on the premise that the local indigenous peoples were savage or barbarian and certainly had no developed legal property tenure comprehensive to the Europeans. Those early cases have now been overruled. But the present legal quandary remains about how best to reconcile with indigenous peoples, who have had most of their lands and properties taken from them. Many contemporary domestic courts, domestic legislatures and international instruments are attempting to find palatable answers to how best reconcile with indigenous peoples.

Some of these attempts at reconciling initiatives involve recognizing indigenous peoples rights to continue to govern land and water. And my own work, as Chris has kind of explored in depth, I have explored this issues across a range of land and water types. So private land, public land, indigenous land - like Māori free hold land here in Aotearoa, foreshore and seabed, rivers and lakes. But the land classification of national parks, as places that are assumed to be owned by the Crown, interest me most and what I am going to focus in on today.

Perhaps it was because I was brought up in the depth of the South Island, so away from my tribal area, at the bottom of the slopes and mountains and forested river valleys

of lands encased in national park boundaries – the Mount Aspiring National Park and Fjordland National Park. So growing up in these mountains, in this tiny little place called Glenorchy. Mountains that I adore and I always knew that this land was of cultural significance to Ngai Tahu, the Māori tribe or iwi of this area, but where were they?

Present was instead the Department of Government Conservation that asserted ownership and management responsibilities over these lands. So something seemed amiss. This childhood unease led me on my adult journey of dreaming for better and more respectful law to acknowledge indigenous peoples rights to remain governors and stewards of lands and waters essential to their cultural identities and survival.

In recent decades, the resilience and strength of indigenous people to fight for recognition of their relationship with lands and waters encased in national park boundaries has begun to get results in these once English colonies. So in this address today or this evening, I want to play on the title of William Cronon's seminal work really, so a Canadian professor. He titled his work "the trouble with wilderness or getting back to the wrong nature" to explore a phase I use "the trouble with space". So in my work, I have argued that 'space' has been used globally as a colonial nation-building tool to overlay the lived homes of indigenous peoples. So the present reconciliation initiatives in countries like Aotearoa New Zealand partly recognize the fiction of colonial space through Crown apologies and provisions for some indigenous economic and cultural opportunities. But can space be simply understood within the framework of power? I don't believe so. Tinkering with provisions of indigenous representation and recognition rights in contemporary Crown indigenous settlement treaties may not result in a reconciled future. Nation states need to address the deeper tensions by considering broadly the implications of how the legal foundations of our nations states have been built upon the magic of colonial space and place.

So while I know most here will understand the connotations of space, it is a relatively new concept to be exploring within the discipline of law. And we have a geographer, not a lawyer, to thank for this, notably the Canadian professor of geography Nicholas Blomley. So space is of course a well-known theoretical concept, key to exploring human geography, and I know many of you in the room will be familiar with the theoretical work around space. For a quick insight, space is antithesis of place. So as you all know, space and place are difficult to define. But in brief, as Tim Creswell writes in his book dedicated to exploring the term place, place is "a way of seeing, knowing and understanding the world." He writes "when we look at the world, as a world of places, we see different things. We see attachments and connotations between people and place, we see worlds of meaning and experiences." And the same for these two images here. Ngai Tahu will see something quite different in looking at these mountains and forest and water compared to others now visiting this area.

So space thus is seen in distinction to place, as a realm without meaning. So space becomes place when human invest meaning in it. It is possible and common for one person to look at for example land and see place and for another person to see space. And thus seeing the trouble with space is an integral component of decolonization. The essential trouble with space is that, I argue, the entire legal foundation for colonial settlement is founded on it. But this does not make it right. As the indigenous Anishinabe law professor John Borrows has asserted a house built upon a foundation of sand is unstable no matter how beautiful it may look or how many people may rely upon it. So he

is commenting there on our legal system. Hence the problem with power may only be illusionary until the trouble with space is confronted. Of course the present reconciliation jurisprudence and once English colonies being to recognize the fiction of colonial space. For example, it is no longer acceptable in law to regard countries like Aotearoa New Zealand as settled in accordance with the English common law doctrine of *terra nullius* - a Latin term to mean no man's land. And while terra nullius is a term we are probably familiar with in terms of applying to Australia, it did have a long life here in Aotearoa New Zealand, too. But in recognizing indigenous peoples as civilized, rather than as savage, and their lands as their homes rather than as empty wastelands, what does this mean for our futures?

Does reconciliation mean that indigenous peoples should just be given some rights of recognition and representation to share in the management of these lands, often labeled national parks? So for example, is co-management our answer? Or is it something more and deeper than that? Is it enough to tinkle with power and thus management rights, or do we need to go deeper and look at the foundations of our legal system and in particular property tenure, essentially ownership responsibilities. Well yes and no, so just months ago a ground-breaking Crown-tribal settlement occurred here in Aotearoa New Zealand with one of our National Parks Te Urewera. It is a park in the north island that I am going to focus on for most of my talk that gives a glimmer of hope for reconciliation today. But first, some context.

So national parks, why am I focusing on national parks? National parks, at least those modeled on the first national park established in the 'New World', which is in the United States, the Yellowstone National Park are places that are typically owned and managed by the Crown, and that remains true today, they are set aside from private sale, for present and future generations to 'use, enjoy and appreciate the country's distinctive scenery, ecological systems and natural features'. So the National Park label was used to transform the so-called 'wild and empty' spaces of indigenous lands into places for recreation, tourism and conservation. It was first applied in the 19th century by the European newcomers in the colonies of the United States, in that order actually, in the United States, then Australia, then Canada and then Aotearoa New Zealand. So let's look quickly at two of these countries. Aotearoa New Zealand has 14 national parks, our conservation land encompasses one third of our country. So national parks are really significant in this context here in this country. Here is a map of Canada. Canada has 35 national parks and 7 national park reserves. And they all exist for similar reasons. So, in law 'for the public to use and enjoy'. In Aotearoa New Zealand the Crown department responsible for managing national parks is the Department of Conservation and in Canada it is Parks Canada. So the first priority for national parks, for these government departments and for managing these national parks is in Canada "the maintenance or restoration of ecological integrity through the protection of natural resources and natural processes. In Aotearoa New Zealand the goal is conservation, and you can see here on this slide the definition of conservation. What's really remarkable here is obviously is that these parks are not persevered at all for the indigenous connections to these lands. Completely absent from our national park legislation in both of these countries is this recognition. So ecological integrity in Canada and conservation in Aotearoa New Zealand are integral to the park concept. But the present law in recent years has been amended to respect indigenous peoples.

So section two, subsection 2 of the Canada Parks Act 2000 explicitly supports existing Aboriginal and treaty rights of the aboriginal peoples of Canada and makes a link into section 35 of the Constitution Act of Canada. In Aotearoa New Zealand section 4 of our Conservation Act, which is our umbrella act to our conservation legislation including our National Parks legislation it sets underneath, 'shall so be interpreted in administered to give effects to the principles of the Treaty of Waitangi'. For those visitors to Aotearoa New Zealand, just very briefly, the Treaty of Waitangi was a document signed in 1840 by the British Crown and over 500 Māori chiefs from throughout the country, which provided a blueprint for how Māori and the British could live together in Aotearoa New Zealand. So these legislative provisions are steeped in a parallel legal reconciliation discourse that began to emerge in the 1970s. So courageous indigenous leaders led this discourse by for example taking claims to the courts and in turn brave judges for the first time began to listen and respond to these indigenous calls for justice. For instance, Canadian case law recognizes Canada's aboriginal peoples, that they have rights, because, as chief justice McLaughlin of the Supreme Court of Canada has stated "they were here when Europeans came and were never conquered, therefore the Crown acting honorably cannot run roughshod over Aboriginal interests." A similar jurisprudence has emerged in many other countries, including here in Aotearoa New Zealand. The courts talk about the Treaty principles as requiring 'The Crown and Maori treaty partners to act towards each other reasonably and with the outmost good faith'. This developing jurisprudence in both countries, has been instrumental in building a platform for the current statuary recognition of the importance of engaging with indigenous peoples in the governance of national parks. So it's these new legislative directions that post a strong challenge to the 21st century concept of a national park.

So national parks provide an ideal basis against which to assess the implication of new more inclusive, respectful legal relations. National parks are after all 'ancestral places of indigenous peoples, products of colonialism positioned as symbolic to our national identity and a subject to this legal reconciliation discourse'. So, to briefly touch on these four points. So the first point, as we know, the indigenous worldview is based in an understanding that the humans are intimately related to the environment, and that the landscape records our stories of identity and knowledge. So some landmarks are especially important. If I show you this map of Aotearoa again, I am going to tell some very quick story about Aoraki Mount Cook, our tallest mountain that is encased in a national park here. The Tongariro mountain that become our first national park, Tongariro in the middle there and Egmont, Mount Taranaki over on the west side of the the North Island there. So for example, Aoraki incidentally New Zealand's highest mountain, who is believed to be the son of Ranginui, the skyfather, who peddled in a waka, a boat, with his brothers, searching for Papatuanuku the earth mother. Unable to find here, they preceded to say a karakea – a prayer – to return to their father. But they said the prayer incorrectly forcing their boat to hit a hidden reef, as they scrambled to the high end of the waka – the boat – they and their boat turned to stone and in the process of doing so created what we commonly call today the South Island. And in another legend described as Maui's boat, upon which he fishes up the North Island. So Aoraki, that son who scrambled to the top is not personified there as our tallest mountain in Aotearoa New Zealand. So for Ngai Tahu, Aoraki as their essential ancestor is so important their Ngai Tahu identity. I could say lots more, but … carry on. Or take the mountains in the center

of the North Island, where love battles story tells of how they came their present standing spots. So a long time ago, the male mountains, including Taranaki fought with Tongariro over a beautiful Pihama. So Tongariro won the battle, and the other male mountains were banished from the area including Taranaki, who fled, forging a major river in his path. And this explains why Taranaki stands alone on the west coast. And there is lots of these stories in te Ao Māori, in the Māori world about the positioning of our landscape. Moreover, national parks, particularly in Aotearoa New Zealand context, where national parks constitute nearly one third of the country, contain most of the remaining flora and fauna. This is important because, as the Waitangi Tribunal - a permanent commission of inquiry tasked with making recommendations to the Crown to rectify past and present breaches of the Treaty principles, recently stated "the department of conservation has charge of much of the remaining environment in which Māori knowledge evolved and which Māori culture needs for its ongoing survival." Thus national parks are important to indigenous spiritual identity and cultural survival. Thus on this first point, national parks provide an ideal focal point for exploring the Crown's commitments to reconciliation, because these indigenous places are in assumed Crown ownership rather than private ownership. They provide the perfect place for reimagined governance.

Second, national parks are modeled on the United States Yellow Stone National Park established in 1872 are products of colonialism that enabled the British settlers to put to use lands they considered as empty spaces, untouched and wild. The colonial ideology empowered the colonialists to be blind to the first peoples way of life and lay their own histories and language over the mountain peaks and river valleys. Rationalized first as a tourist and recreational tool, it was not until the 20th century that national parks became firmly embedded in conservation goals. Third, national parks are positioned as symbolic of our national identity and future. For example, over the past decade, taking some quotes here from Parks Canada, has stated that national parks are, and you can read those points there. So, such places deserve close attention. If the new indigenous rights jurisprudence is to be believed and the Department of Conservation here in Aotearoa has even condensed in one instance the goal of strengthening national identity and upholding the Treaty principles, then national parks are places that ought to symbolize transformative relationships, showcasing how respectful relations with indigenous peoples can be created and how colonialist ideals of space can be displaced.

So, moving to my fourth point, I have already spoken a little bit about this. We now have a mandatory legal reconciliation required in the context of national parks. So significantly in recent years both the Department of Conservation and Parks Canada have been making attempts to embrace the new legal discourse. Ok, for some time the international community has been aware and supportive of the need to recognize indigenous peoples in the governance of national parks. It's quite a long quote there but it's just emphasizing that at international level there is also recognition of the importance of that relationship between indigenous peoples and lands now governed as conservation areas. This international work also recognizes some key challenges. So the IUCN has concluded 'most protected areas were proclaimed without the expressed consent of the people who previously inhabited lands or seas in the region. As a result, protected area authorities have been making decisions about species or ecosystems contained in these areas without the full involvement of key stakeholders. Fortunately this situation is now changing. This is partly because of more general acceptance of indigenous peoples rights

is emerging and partly because it is now widely recognized that the involvement of indigenous peoples is essential to ensure long-term sustainability of protected areas in which they live or in which they have an interest. However, in reality the involvement of indigenous and traditional peoples in the planning and decision making processes, and empowerment of local groups often fall short of the ideal. So, that's what is being stated at the international level. But as I said a couple of moments ago some significant amazing things are happening the world. And one of these exciting initiatives is underway here in Aotearoa New Zealand, specifically in Te Urewera.

So, a new dawn for conservation governance in Aotearoa New Zealand has been ushered in with the enactment of new legislation Te Urewera Act 2014. Te Urewera is in quite a remote part of New Zealand, here on the east coast. Te Urewera, named a national park in 1954 and managed as Crown land by the Department of Conservation became simply Te Urewera on the 27th of July of this year (2014), so a legal entity with all the rights, powers, duties and liabilities of a legal personality. It has its own legal personality. Te Urewera Act is legally revolutionary here in Aotearoa New Zealand and on world scale. It is a place with a long fraught history. So land was confiscated, villages and crops burnt, families killed, and men executed. And I've got two video clips that I want to show to help bring this alive. The first video clip is taken from May 2010 and its where our prime minister has nearly, on the brink, basically on the night before its reached an agreement with Tuhoe, the tribe of the area of Te Urewera. They have agreed to basically give ownership back to Tuhoe. The night before that paper is to go to cabinet to be approved, the Prime Minister pulls back from it. So this is where we are picking this up. (Video I: John Key about Tuhoe)

So that's one of my many low points between the relationship between Tuhoe and the Crown. So that was in 2010 and if we fast-forward a couple of years to last year, a major settlement was agreed between Tuhoe and the Crown that I am going to talk about for a moment. I also want to share this clip, it runs for about 2 and a half minutes. It's of Tame Iti one of the main sort of spokes people for Tuhoe, New Zealanders will be very familiar with Tame Iti. He talks about why this area is so special to him. (Video II)

That clip just tries to capture the importance of the land to Tuhoe. And the settlement that has since taken place, so the Te Urewera Act of 2014 makes it clear that Te Urewera 'ceases to be vested in the Crown, ceases to be Crown land, and ceases to be a national park'. It is really significant. So, Te Urewera is now free-hold land, or be it inalienable, Te Urewera is now not managed by the Department of Conservation, but by the new Te Urewera board. This board is responsible 'to act on behalf of and in the name of Te Urewera'. So Te Urewera will still have a management plan like other national parks in New Zealand. The board, rather than the Department of Conservation will approve these plans. For the first three years the board has a fifty-fifty membership of Tuhoe and Crown appointed persons, so four persons each and thereafter the board will increase by one and the ratio will change to 6 persons Tuhoe appointed and three persons Crown appointed. The board in contrast to nearly any other statuary created body, including the Department of Conservation, is directed to reflect customary values and law. So the Act states that the board may 'consider and give expression to Tuhoetanga and Tuhoe concepts of management' and expressed in the Māori language (te reo: 40:13). The Act makes it clear that the board must consider and provide appropriately for the relationship of Māori tribes, iwi and subtribe hapu, and their culture and traditions with

Te Urewera when making decisions and that the purpose of this is to recognize and reflect Tuhoetanga and the Crown's responsibility under the Treaty of Waitangi. The Act mandates that the board must strive to make decisions by unanimous agreement, such as the approval of Te Urewera management plan and some decisions by consensus. The board must work with the chief executive of Tuhoe and the director general of the Department of Conservation to develop an annual budget and an annual operational plan. The Act stipulates that activities are permitted in Te Urewera and what activities require authorization and in what form. The National Parks Act does something similar for national parks. The Act lists activities that require an activity permit, these include taking any plant, disturbing or hunting any animal, possessing dead protected wildlife for cultural or any other purpose, entering specially protected areas, making a road etc. It is a comprehensive list and demonstrates the tight rules for preserving national park land has been transported into Te Urewera Act. Throughout Te Urewera Act it makes clear that Te Urewera may still be mined, so there are still some issues in there, it will be interesting to see how they are be negotiated in the future. Section three of Te Urewera Act is so beautifully expressed that I have copied part of it here, it talks… this in in legislation, so if you are familiar with reading legislation, this is not the normal way that we write in law. The real sense of the importance to Tuhoe comes through in the legislation. "Ancient and enduring, has an identity in and of itself, inspiring people to commit to its care". It talks about here "for the Tuhoe people, their story …is captured in the act, the heart of the the great fish of Maui, is the place of their origin and return to their homelands, so it's their place. And the recognition that Te Urewera is prized by all of us".

Te Urewera Act is significant in a comparative in a domestic and international context, we are running out of time and I know people are looking forward to the conference dinner, so just four points to be made here. Maybe I just talk to my powerpoint slides to speed it up. So, the is the first permanent removal of a national park from the National Parks Act, the only other example we have here in Aotearoa New Zealand is the settlement that was negotiated here in the South Island with the Ngai Tahu tribe for Aoraki Mount Cook. So, remember Aoraki is the son of the sky father, so significantly important to Ngai Tahu, in the Ngai Tahu settlement claim in 1998. There is a provision in there for Aoraki to be returned to Ngai Tahu ownership, but only for seven days and at the end of the seven days Ngai Tahu must gift that mountain back to the nation. And there is supposed to be a big celebration for the country around that and recognizing what Maori have given up in terms of creating a settlement, a Crown contemporary settlement. Ngai Tahu have not actioned that seven-day vestment and they won't do so until they are happy with how that settlement has come together. That settlement took place in 1998 legally and that still has not happened yet and there is no real horizon for that to happen, yet, I don't think. Te Urewera demonstrates a new bicultural way of understanding the importance of place. So if you remember back in the national parks legislation why we have national parks, very much a monocultural statute, it is there for 'the benefit and enjoyment of people'. Why do we have Te Urewera? Here you can see all the way through that cultural recognition of the place is a place for these indigenous peoples, so the cultural values, the connection between Tuhoe and Te Urewera and also still for public use and enjoyment, but it is not the centre piece or reason for why we have this place protected. Te Urewera is of national interest. I can talk here particularly there is some comparative work in the Canadian context, and there is a

lot of angst I suppose at an international or at domestic level in other countries about these issues of ownership. So for Canada, Canada National Park legislation clearly states that the Crown has clear title to and rights of ownership in lands to be included in a park. In the late 19th century and in the 20th century at times, Canada forcibly removed aboriginal peoples from lands intended for national parks in order to assert that clear title of ownership. In the 1970s as Canada sought to create new national parks in the remote northern territories of Canada, a new solution to diluting the ownership issue was initiated. Canada introduced the novel legislative tool, the National Park Reserve label. The legal definition for a national park reserve is an area or a portion of an area proposed for a park that is subject to a claim in respect of aboriginal rights that is being accepted for negotiation by the government of Canada. So the idea is that Canada can set aside land as a National Park Reserve and manage it as if it were a national park even if there is an accepted aboriginal rights claim to the land in question. The idea is that after negotiating that claim the Crown will then hopefully, hope that the Crown will then confirm that land as a national park. There are several instances in the northern territories where the aboriginal peoples are acquiescing to the national parks and thus Crown ownership of these lands, but in the southern more populated provinces the ownership issue is more contentious. So, no national park reserves in the south have been re-classified as national parks, in fact national parks created post 1970s in the south have mostly not even used this temporary National Park Reserve label. Ownership and management of many of the southern national parks remains heated as do these issue in many other countries, including still New Zealand. So, Te Urewera will be of interest internationally because it moves away and parks that ownership, that really contested ownership issue and creates a solution in the middle, kind of a win-win solution, by saying well this land, this area has its own personality, it has its own legal personality in its own right, no one can own this. It is not owned by the Crown, it is not owned by indigenous peoples, it has its own legal personality, its own ownership. So the middle-ground solution that is being heralded here. Just some comments here from three of our MPs, a Green Party MP, you can see there a reference to the mist, Tuhoe people are often referred to as children of the mist. Next, Smith, who was Minister of Conservation at the time said "it surprises me as a minister of conservation in the 1990 who was involved in … under the leadership of the honorable Jim Boulding, who was in the house at the time of the passing of Te Urewera Act and there was a huge debate around the Ngai Tahu settlement in 1998 in respect to conservation land and how far this country and this parliament have come when we now come to this Tuhoe settlement. So "if you would have told me 15 years ago that parliament would unanimously been able to agree to this bill, I would have said you are dreaming, mate." So there has been a real journey that has been captured here in Aotearoa New Zealand from the 1990s to 2014. And put a sharples here stating that "the settlement is a profound alternative (no sound) and really that Tuhoe autonomy or self-determination. So just as a concluding comment, as I said at the beginning of my talk, a lot of my work as focused on arguing for legislative reform to better recognize the rights and relationships of indigenous peoples to govern n ational parks. In 2012 I concluded a major piece of work with these words: "National park lands encase the lived homes on indigenous peoples, today the law reflects a new societal goal that seeks to reconcile with indigenous peoples for the use of past wrongs of taking their lands and denying them the very means to be true to themselves, their ancestors and their

grandchildren. National parks have the potential to play an instrumental role in committing to this reconciliation journey. National parks are symbolic of our national identity and our future and the parks contain Crown lands that thus enable the Crown to lead and implementing a new way of thinking about owning and managing lands, including national parks". While I dreamt of new legislative reform when writing that I did not know that the horizon for change was so near. The enactment of Te Urewera Act makes me immensely proud to be a New Zealander, it offers hope and inspiration that legislative change is possible. So space has been used globally as a colonial nation building tool to overlay the lived homes of indigenous peoples and national parks are a perfect example of a tool that has been utilized to achieve this. The present reconciliation initiatives in countries like Aotearoa New Zealand and Canada partly recognize the fiction of colonial space through Crown apologies and provisions for some indigenous economic and cultural opportunities. But can space be simply understood within the framework of power? A question I asked at the beginning of this talk. Tinkering with indigenous representation and recognition rights may not result in a reconciled future. Nation states need to address the deeper tensions of space and consider broadly the implications of the legal foundations built upon the magic of colonial space and place. Te Urewera Act provides and an excellent temporary example of the possibilities of imagined respectful governance. Thank you for this opportunity to join your conference. Tena kotou tena kotou tena kotou katoa.