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On the Borderline: Who Is a "Traditional Inhabitant" under the Torres Strait Treaty?

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Abstract: The Torres Strait Treaty between Australia and Papua New Guinea ("PNG") came into force in 1985. This unique treaty, which defines the maritime, seabed and fisheries boundaries between Australia and PNG, is recognised as one of the most complex, but imaginative maritime delimitation solutions in existence. The Treaty creates a Protected Zone with a view to safeguarding the traditional way of life and livelihood of traditional inhabitants of the Torres Strait and adjacent coast of PNG. Traditional inhabitants are allowed relatively unrestricted cross-border movement into the Protected Zone for the purpose of performing traditional activities. "Traditional inhabitants" are defined by the treaty, but the relevant provision is ambiguous and the question of who is within the terms of the Treaty is highly contentious. The problem is exacerbated by the competing layers of law which govern the Strait and surrounding Borderlands, and by the dissonance between State law, customary laws, and the practical application of the Treaty. This paper looks at the meaning of "traditional inhabitants" and some of the other issues surrounding this question.

Keywords: traditional inhabitant, Torres Strait Treaty, customary law, Papua New Guinea, Torres Strait Islands

1 Introduction

The Torres Strait lies between the Southwestern coast of Papua New Guinea and the tip of Cape York, in the far North of Queensland, Australia. The Strait is a 150 km wide passage between Australia and PNG and constitutes a major international shipping route, providing a source of livelihood for the many distinct communities living in the area. The Torres Strait Treaty between Australia and Papua New Guinea ("PNG") came into force in 1985. This unique arrangement, which defines different maritime, seabed and fisheries boundaries in the Torres Strait, is recognised as one of the most complex, but imaginative maritime delimitation solutions in existence. The Treaty creates a Protected Zone with a

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view to safeguarding the traditional way of life and livelihood of traditional inhabitants of the Torres Strait and adjacent coast of PNG. Only "traditional inhabitants" are allowed to benefit from the terms of the treaty, which allows relatively unrestricted cross-border movement into the Protected Zone for the purpose of performing traditional activities. Thus, the meaning of the term "traditional inhabitants" becomes of vital importance for those who wish to cross to and fro. These are mostly travellers from PNG to the Torres Strait Islands, seeking to make a livelihood or to take advantage of services that are only available in Australia.[1]

The term "traditional inhabitant" is defined by the Treaty, but the relevant provision is ambiguous and the question of who is within the terms of the Treaty is highly contentious. The problem is exacerbated by the competing layers of law which govern the Strait and surrounding borderlands, and by the dissonance between State law, customary laws, and the practical application of the Treaty.

This article explores the meaning of "traditional inhabitant", exploring the definition under the Treaty and in other surrounding laws. Commencing with a brief overview of the region and the Treaty, the article moves to a roundup of applicable laws. It then proceeds to an in-depth discussion of the definitions and their possible interpretations. It then examines some of the other issues surrounding this question.

2 Background

2.1 The Region

The Torres Strait Islands fall into four geographical groups:

- the east islands: small, high volcanic islands with dense vegetation;
- the central islands: small, low sandbanks raised on coral reefs and sparsely vegetated;
- the western islands: large, high, rocky islands; and
- the north-western islands: large, low-lying, swampy and sparsely vegetated islands formed by alluvial soil carried by the rivers from the Papuan mainland.

1 According to the Department of Immigration and Citizenship about 98 % of travel is by Papua New Guineans: Submission no. 16 to Senate Standing Committee on Foreign Affairs, Defence and Trade, *The Torres Strait: Bridge and Border* (Canberra, 2009), p. 9.

Saibai, together with Dauan and Boigu Islands make up the north-western island group.[2] These islands were singled out in the Treaty to remain part of Australia, even though they lie north of the jurisdictional borderline.[3] The main reason for this was historical, the Colony of Queensland having pushed its boundaries North[4] to guard against expansion by non-British colonial powers.[5] Fish and crabs are abundant in the muddy seas surrounding the islands. Dugongs and turtles are more abundant in the clearer southern areas of the Strait.[6]

On the Papua New Guinea side of the border, the southwestern coast lies within the South Fly District of Western Province. It is part of the country's lowlands, as opposed to the highlands of Papua New Guinea further North. The eastern end of this area is marked by the Fly River Estuary. To the north and northeast lie the lower reaches of the Fly River. To the west, the coast extends to the border between Papua New Guinea and Indonesia. The area is generally low and flat; with clay soil, mostly devoid of stone. A few small islands lie off the coast, including Daru, the capital of Western Province. There is a lack of fresh water in the dry season and flooding in the wet season. Whilst gaining some protection from the reefs, the coastline is subject to erosion from the wind and waves.[7]

2.2 The Treaty

The Torres Strait Treaty had a long gestation period. Commencing during the colonial era, discussions about the border between Papua New Guinea and

2 Dauan Island is geographically part of the north-western group of islands along with Saibai and Boigu, however, geologically it is part of the western group of islands. For this reason, Beckett groups Dauan Island with the high, rocky islands in the west such as Badu and Mabuiag: J. Beckett, "The Torres Strait Islanders," in D. Walker (ed.), *Bridge and Barrier: the Natural and Cultural History of Torres Strait* (Canberra: Australian National University, 1972), pp. 310–311. See also D. Lawrence and H.R. Lawrence, "Torres Strait: the region and its people," in R. Davis (ed.), *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Canberra: Aboriginal Studies Press, 2004), p. 17.

3 Lawrence and Lawrence (2004), *supra* note 2, p. 17.

4 Letters Patent 1872, Legislative Council Journal 1872; Proclamation and Deed of Transfer, *Queensland Government Gazette*, August 24, 1872; Letters Patent 1878, *Queensland Government Gazette*, July 19, 1878; *Queensland Coast Islands Act 1879* (Qld); *Colonial Boundaries Act 1895* (UK).

5 S. Kaye, *The Torres Strait* (Cambridge: Kluwer Law International, 1997), pp. 35–38.

6 Lawrence and Lawrence (2004), *supra* note 2, p. 17.

7 K. Murphy, *The Cultural Organisation of Social Difference and Relatedness at the Border between Australia and Papua New Guinea*, PhD Thesis, The Australian National University (Canberra, 2013), pp. 22–24.

Australia became more intense in the lead up to Independence for Papua New Guinea.[8] After six years of negotiations, the Treaty was finally signed in December 1978 and entered into force in February 1985.[9] It is a unique arrangement, with multiple objectives, including recognition of sovereignty over the islands scattered throughout the Strait. As mentioned above, it establishes the borders between Australia and PNG along different lines for country, seabed and fishing. Whilst the country and seabed mainly have a common border, several islands lying north of the Seabed Jurisdiction Line are also part of Australia,[10] including their territorial seas with a limit of three nautical miles. The Fisheries Jurisdiction Line follows part of the seabed line, but deviates northwards to create an area described as the "top hat", which increases the area over which Australia has rights over swimming fish.

The Treaty also establishes a Protected Zone for the purpose of allowing Torres Strait Islanders and the coastal people of Papua New Guinea to carry on their traditional way of life.[11] Traditional inhabitants from both countries may travel across the country border into the Protected Zone without passports or visas to carry out traditional activities. This freedom of movement was part of the way of life in the Torres Strait, and is essential to the maintenance of the social fabric of the region, consisting of kinship ties and interlinked traditions. These including traditional fishing, cultural exchanges and trading networks. The Protected Zone is also designed to conserve the environment and promote sustainable development in the region.[12]

8 See further M.D. White, "Establishment of the Queensland Border in the Torres Strait," in P.J. Boyce and M.D. White (eds.), *The Torres Strait Treaty: A Symposium* (Canberra: Australian Institute of International Affairs and ANU Press, 1981), p. 16.

9 *Torres Strait Fisheries Act 1984* (Qld), proclaimed in *Commonwealth of Australia Gazette*, no. S 38, February 14, 1985; *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG).

10 These islands are Anchor Cay, Aubusi Island, Black Rocks, Boigu Island, Bramble Cay, Dauan Island, Deliverance Island, East Cay, Kaumag Island, Kerr Islet, Moimi Island, Pearce Cay, Saibai Island, Turnagain Island and Turu Cay.

11 Department of Foreign Affairs and Trade, *The Torres Strait Treaty*, available at: <http://dfat.gov.au/geo/torres-strait/Pages/the-torres-strait-treaty.aspx>, accessed January 24, 2019.

12 *The Torres Strait: Bridge and Border*, report by the Senate Foreign Affairs, Defence and Trade References Committee (Parliament of Australia, Canberra, 2010), para. [18.13], citing Murphy, *Committee Hansard* (June 18, 2010), p. 9.

3 Law in the Borderlands

3.1 Formal Law

In considering the meaning of "Traditional Inhabitants" it is important to take stock of the sources of laws that might bear on this question. Their place in the legal systems of Australia and Papua New Guinea is also relevant to gauge the weight to be given to the prevailing laws.

3.2 International Law

Both Australia and Papua New Guinea are dualist nations, meaning that the Torres Strait Treaty, like other treaties to which the countries are party, did not become part of domestic law until legislation incorporated it into the legal system.[13] To put it another way, treaties sit outside the hierarchy of laws for both countries, and any rights or obligations created by treaties which concern the Torres Strait region are regulated under national law. In the case of Australia, the treaty was brought into force by *Torres Strait Fisheries Act 1984* (Cth) and *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (Cth). In PNG, the treaty was brought into force by the *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (PNG) and the *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG).[14]

The Torres Strait Treaty is not the only treaty of relevance in the Borderlands. The Torres Strait is an international strait for shipping, governed by the United Nations Convention on the Law of the Sea.[15] In addition, there is an extensive list of multi-lateral and bi-lateral agreements that are relevant. Whilst none of these have a direct impact on the meaning of "traditional inhabitant", the Vienna Convention on the Law of Treaties (the "Vienna Convention") contains guidance on interpretation of treaties and therefore has a bearing on the meaning of the phrase. In particular, it states that a treaty should be interpreted in context, with reference to its object and purpose.[16] For the purpose of interpretation, a treaty

13 D. Feldman, *Monism, Dualism and Constitutional Legitimacy* (1999) 20 Australian Year Book of International Law, no. 105 (1999), 105–126 at 109; G. Cranwell, *The Treaty Making Process in Australia: A Report Card on Recent Reforms*, Australian International Law Journal (2001), 177.

14 See also, *Fisheries (Torres Strait Protected Zone) Regulation 1987* (PNG).

15 *United Nations Convention on the Law of the Sea*, opened for signature on December 10, 1982, 450 UNTS 82, 21 ILM 1261 (entered into force November 16, 1994).

16 *Vienna Convention on the Law of Treaties*, opened for signatures May 23, 1969, 1155 UNTS 331 (entered into force January 27, 1980) ("*Vienna Convention*"), art. 31, para. 1.

includes the preamble, annexes to a treaty and related agreements or instruments made in connection with the conclusion of a treaty.[17]

Customary International Law is also applicable in the Torres Strait, and is of particular importance to maritime zones and the control of fishing, which is crucial to many Pacific islanders.[18] However, it does not shed any light on the meaning of "traditional inhabitants".

3.3 State Law

The *Australian Constitution* is the supreme law In Australia.[19] followed by statutory law, both at Commonwealth and State level. The distinction between Commonwealth and state legislative power is found in s 51 of the *Australian Constitution*, which outlines the Commonwealth parliament's legislative jurisdiction, with the residual power belonging to the States.[20] Finally, the common law completes the formal hierarchy of laws. Notably, customary law is absent from this hierarchy as there is no formal, general recognition of customary law in Australia.[21] However, there are some legislative schemes that recognise customary law and require that it be taken into account in particular matters concerning particular persons.[22]

The *Constitution of the Independent State of Papua New Guinea* (*Constitution of Papua New Guinea*)[23] and the Organic Laws constitute the supreme law of PNG.[24] The organic laws are a superior class of statutes on a range of subjects specified by the Constitution and subject only to the Constitution.[25] These laws prevail over all other acts, whether legislative, executive or judicial.[26] Between themselves, the Constitution takes precedence.[27] Acts of Parliament are next in

17 *Ibid*., art. 31, para. 2.
18 See e. g. *Fa v Naniura* [1990] PNGLR 506.
19 *Australian Constitution*.
20 *Ibid*., s 51.
21 J. Corrin, S. Bennet and A. Chen, "Report on Pleading and Proof of Indigenous Customary Law in Queensland Courts" (Centre for Public, International and Comparative Law, TC Beirne School of Law, Brisbane: April 2010), p. 8.
22 *Ibid*., 45.
23 *Constitution of the Independent State of Papua New Guinea* (PNG) ch. 1 ("*Constitution of Papua New Guinea*").
24 *Ibid*., s 11(1).
25 *Ibid*., s 12(1). An Organic Law may be altered only by the Constitution or another Organic law: s 12(2).
26 *Ibid*., s 11(1).
27 *Ibid*., s 10(b).

the hierarchy of laws,[28] followed by other written laws. These include the provincial laws and "subordinate legislative enactments".[29] At this point, the law of Papua New Guinea departs radically from the Australian hierarchy, establishing the underlying law as next in the hierarchy.[30] This consists of,[31] in order of precedence,[32] customary laws, and the "common law in force in England immediately before the September 16, 1975".[33]

It is hard to be specific about the customary laws that are relevant to the Treaty arrangements, as these laws differ from place to place. There is no convenient jurisdictional border for customary laws as there is with State laws. However, whilst there is diversity in the way that custom is practised, there is said to be an "underlying uniformity of culture between the islands",[34] which manifests itself in the notion of *Ailan Kastom* (Island Custom).[35] *Ailan Kastom* is defined in the Torres Strait Islander Land Act 1991 (Qld)[36] as, "the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships". The reference to particular groups acknowledges the fact that, although there were numerous cultural and linguistic similarities, the people of the Torres Strait did not identify with a single monocultural group, but rather had unique cultural identities.[37] Custom and culture is equally diverse on the mainland, illustrated by the fact that there are 50 local languages used within the Western Province of PNG,[38] which gives some indication of the diversity of customary laws. Custom is defined in the Constitution of Papua New Guinea as meaning:

> the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether the custom or usage has existed from time immemorial.[39]

28 *Ibid*., s 9(c).
29 *Ibid*., s 9(d)–(e).
30 *Ibid*., s 9(f).
31 *Ibid*., sch 2.1.1–2.2.2.
32 *Underlying Law Act 2000* (PNG) s 4.
33 *Ibid*., s 3(1).
34 J. Beckett, *Torres Strait Islanders: Custom and Colonialism* (Sydney: Cambridge University Press, 1987), p. 22.
35 L.R. O'Donnell, *The Torres Strait: A Case Study Analysis in Multi-level Governance*, PhD Thesis, Griffith University (Brisbane, 2006), p. 52.
36 *Torres Strait Islander Land Act 1991* (Qld) s 6.
37 O'Donnell (2006), *supra* note 35, pp. 50–51.
38 *Ibid*., p. 174, fn. 252.
39 *Constitution of Papua New Guinea*, sch 1.2.2.

This definition discards the colonial interpretation of customary law as a static concept[40] in favour of a flexible, living law. This is important to keep in mind in the interpretation of the terms of the Treaty which refer to custom and tradition.

As can be seen from this brief description, there is an asymmetry in the sources of law on the different side of the border. Most significantly, in PNG customary laws are theoretically superior to the common law. Further, although the written law, including the statutes domesticating the Treaty, are superior to the underlying law, in the interpretation of those statutes, the *Underlying Law Act* provides as follows:

> INTERPRETATION OF WRITTEN LAWS. (1) When interpreting any provision of, or any word, expression or proposition in any written law, the court shall give effect to any relevant customary practice, usage or perception recognised by the people to be affected as a result of the interpretation.[41]

Accordingly, when the terms of the Treaty, as incorporated into municipal law, are interpreted, the law of Papua New Guinea requires this to be done in accordance with "customary practice, usage or perception" of those affected, which in this case is those claiming to be traditional inhabitants. Interestingly, this asymmetry was recognised by Sir Samuel Griffith when he toured the Torres Strait as Premier in 1893. He argued that Sabai and Dauan islands should be returned to Papua New Guinea, not only because they belonged there geographically and ethnologically, but also because the laws of Papua New Guinea were more beneficial for the islanders, as they took into account tribal customs.[42] Examples of the significance of this asymmetry are explored below.

4 Who is a "Traditional Inhabitant"

4.1 The Treaty Definition

The starting point for determination of "traditional inhabitants" is, at least from the perspective of the formal law, the Treaty itself. The term is defined in Article

40 See, e. g. *Cook Islands Act 1915* (NZ) s 2 (repealed), which provides that "'Native custom' means the ancient custom and usage of the Natives of the Cook Islands".

41 *Underlying Law Act 2000* (PNG) s 23.

42 Government Resident Thursday Island, *Report* (1985); *Reproduced in R.B. Joyce, The Border Problem between Papua New Guinea and Australia*, 13 World Review, no. 1 (March 1974), pp. 42–43.

1, which establishes three pre-conditions for qualification as a traditional inhabitant, stating:

> (m) "traditional inhabitants" means, in relation to Australia, persons who-
> (i) are Torres Strait Islanders who live in the Protected Zone or the adjacent coastal area of Australia,
> (ii) are citizens of Australia, and
> (iii) maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities; and
> in relation to Papua New Guinea, persons who-
> (i) live in the Protected Zone or the adjacent coastal area of Papua New Guinea,
> (ii) are citizens of Papua New Guinea, and
> (iii) maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities.

At first blush, paragraph (m) seems quite straightforward. However, it is deceptively difficult to apply. Each of the requirements requires separate consideration:

4.1.1 Condition (i): [Are Torres Strait Islanders Who] Live in the Protected Zone or the Adjacent Coastal Area of Australia/Papua New Guinea

Whilst the three pre-conditions generally equate with each other, condition 1 imposes an additional requirement for those living on the Australian side. They must show that they are Torres Strait Islanders and it has been argued that although there may be grounds for distinguishing this group on the basis of linguistic and cultural difference, this does not equate to a distinct ethnic group.[43] There is no definition of this term in the Treaty. The Commonwealth defines "Torres Strait Islander" by descent in both the *Native Title Act* and the *Aboriginal and Torres Strait Islander Act*.[44] In Queensland, the *Acts Interpretation Act 1954*, which applies to the interpretation of all Queensland Acts,[45] defines the term as meaning, "a person who is a descendant of an indigenous inhabitant of the Torres Strait Islands".[46] Unlike the Commonwealth legislation, the Queensland Act defines a descendant. It provides that the word includes

43 Murphy (2013), *supra* note 7, p. 16.
44 *Native Title Act 1993* (Cth) s 253; *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 4.
45 *Acts Interpretation Act 1954* (Qld) s 2.
46 *Ibid*., s 36, sch 1.

"a descendant under island custom".[47] As mentioned above, island custom, known as "Ailan Kastom" in the Straits, is also defined, and means:

> the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.[48]

The *Torres Strait Islander Land Act 1991* (Qld), which governs claims to and grant of Torres Strait Islander land, gives identical definitions of Torres Strait Islander,[49] descendant,[50] and custom.[51] According to both Queensland Acts, this part of the prerequisites for qualification as a "traditional inhabitant" is governed by descent, which is determined by custom. This acknowledges that identity is more than a racial concept, but does not go as far as legislation in some other Australian States. This legislation, which defines "Torres Strait Islander" collectively with other aboriginal peoples, adds two further requirements to descent: self-identification and acceptance by the community as being a Torres Strait Islander.[52]

Whilst these definitions only apply to the interpretation of the legislation in which they are found or, in the case of the *Acts Interpretation Act*, to Queensland Acts, they do offer some persuasive guidance. Given that the Treaty is a Commonwealth document the definition by descent would carry most weight. In reviewing the *Native Title Act*, the Australian Law Reform Commission ("ALRC") referred to it as one of the most important instruments in "building the relationship between Aboriginal and TSI people and other Australians", but the Act provides no criteria beyond race.[53] The ALRC points out that there is "considerable potential to cause disputes within groups, as well as misunderstanding" under this current legal regime of classification".[54] As the Torres Strait Islands are within Queensland, the definition of descendant by reference to custom could be argued to be relevant to determination of its meaning under the Treaty, but this still falls short of the more nuanced definitions in the legislation of other States, which move beyond race.

47 *Ibid*.
48 *Ibid*.
49 *Torres Strait Islander Land Act 1991* (Qld) s 5.
50 *Ibid*., s 2, sch 1.
51 *Ibid*., s 6.
52 *Aboriginal Lands Act 1995* (Tas) s 3A; *Adoption Act 2000* (NSW) s 4; *Adoption Act 1984* (Vic) s 4; *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT) s 4.
53 *Review of the Native Title Act 1993*, report no. 45 by the Australian Law Reform Commission (2014), p. 12.
54 *Ibid*., 65.

It is also relevant to note that these methods of defining a Torres Strait Islander differ markedly from the definition of members of indigenous communities that has been adopted in Papua New Guinea under the *Underlying Law Act*.[55] This provides that, for the purposes of that Act, a person

> is a member of a community if: (i) he adheres to the way of life of the community; or (ii) he has adopted the way of life of the community; or (iii) he has been accepted by that community as one of its members, irrespective of whether the adherence, adoption or acceptance is effective for a general or for a particular purpose.

This accords more closely to the terminology used by the United Nations Permanent Forum on Indigenous Issues, which refers to "indigenous peoples" rather than "traditional inhabitants", and gives "Aborigines and Torres Strait Islanders of Australia" as an example.[56] The UN-system body has developed a "modern understanding" of that term, based on the following:

- *Self-identification as indigenous peoples at the individual level and accepted by the community as their member*
- *Historical continuity with pre-colonial and/or pre-settler societies*
- *Strong link to territories and surrounding natural resources*
- *Distinct social, economic or political systems*
- *Distinct language, culture and beliefs*
- *Form non-dominant groups of society*
- *Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities*.[57]

This understanding adopts the approach of identification as opposed to definition, in accord with the fundamental criterion of self-identification, which is underlined in a number of human rights documents'.[58]

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55 *Underlying Law Act 2000* (PNG) s 1(2)(a).

56 United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples, Indigenous Voices; Factsheet*, p. 1, available at: <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>, accessed January 19, 2019. The term is contentious; see further, Office of the United Nations High Commissioner for Human Rights, *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9/Rev.2 (2013), pp. 2–3, available at: <https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>, accessed January 18, 2019; African Union Assembly, *Decision on the United Nations Declaration on the Rights of Indigenous Peoples*, 8th session, UN Doc. Assembly/AU/9 (VIII) Dec. 141 (January 30, 2007), para. [6].

57 United Nations Permanent Forum on Indigenous Issues, *supra* note 56, p. 1. Whilst it is not stated expressly in this document, it is clear from the context that not all of these points have to be met; the dominant factors will depend on the context.

58 See, e. g. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135, UN Doc A/RES/47/135 (adopted December 18, 1992).

On both sides of the border, condition (i) requires that the traveller "live in the Protected Zone or the adjacent coastal area" of Australia or Papua New Guinea. The Protected Zone is clearly defined in the Treaty, which refers to a number of cartological Annexes, which give the precise geographical location of the area in which traditional inhabitants can exercise their traditional activities under the Treaty.[59]

The meaning of the phrase "adjacent coastal area" is not so clear. It is defined in the Treaty as meaning,

> in relation to Papua New Guinea, the coastal area of the Papua New Guinea mainland, and the Papua New Guinea islands, near the Protected Zone; and, in relation to Australia, the coastal area of the Australian mainland, and the Australian islands, near the Protected Zone.

The inclusion of "islands" in this description of coastal areas is confusing. On the Australian side, it is capable of including the regions administrative and commercial centre, Thursday Island, and Horn Island, which is the main port for visitors arriving by air. It is also capable of encompassing a wide area of the mainland on both sides, including villages on the tip of Cape York, but it is unclear from the Treaty definition how near the sea a village has to be to be regarded as "coastal".

On the PNG side the meaning of "adjacent coastal area" is vital, as there are no inhabited islands lying within the Protected Zone.[60] Accordingly, all PNG "traditional inhabitants" must live in the adjacent coastal area. However, given the description of this phrase as including "the Papua New Guinea islands", near the Protected Zone, it may include Daru, formerly the provincial capital, and the Parama islands, which lie close to the Protected Zone. As on the Australian side, it is unclear how near the sea a village must be to be regarded as "coastal".

The difficulty that this lack of clarity might cause was recognised in the lead up to the implementation of the Treaty. In the week commencing May 21, 1984, Australian and Papua New Guinea officials met to discuss fisheries and other aspects of the Treaty, in preparation for its ratification. The understanding reached at that meeting with regard to the expression "adjacent coastal

59 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*, signed December 18, 1978, [1985] ATS 4 (entered into force February 15, 1985) art 10 ("*Torres Strait Treaty*"). For the approximate boundaries of the Protected Zone, see: Department of Foreign Affairs and Trade, *Guidelines for Traditional Visitors Travelling Under the Torres Strait Treaty* (2011), available at: <http://dfat.gov.au/geo/torres-strait/Documents/torres-strait-guidelines.pdf>, accessed January 24, 2019.

60 The Protected Zone includes four low-lying islands under PNG's jurisdiction, which are unsuitable for permanent habitation.

area" was recorded in an "Agreed Note of Discussions on May 21, 1984" ("the Agreed Note").[61] This stated:

> "adjacent coastal area" for the purpose of assisting in determining the traditional inhabitants of each country (Art.l(m) of the Treaty) In relation to Australia the area would be that part of Australia bounded by the southern boundary of the Protected Zone, the meridians of longitude 142″E and 143″E, and the parallel of latitude 11″s. In relation to Papua New Guinea the area would be that part of Papua New Guinea south of the parallel of latitude 9″s and west of the meridian of longitude 143″307E together with the whole of the remainder of Parama Island and the villages of Sui and Sewerimabu, subject to the possibility of further areas being included as indicated below (para 5).

It was also agreed that further investigation should be made into whether any other areas should be included in relation to Papua New Guinea and that the areas specified could be changed by mutual agreement.[62] In particular, the village of Samari on Kiwai Island, and its surrounds, was to be considered.[63] It is unclear whether this specific investigation has taken place, but, since the Treaty was brought into force, the definition of the areas included has been changed by government authorities. These changes are extremely contentious and are discussed further below.

Apart from the difficulty in defining "adjacent coastal area", there is also the question of what is meant by "live in". Is residence sufficient or is domicile required? As mentioned above, the asymmetry in the law prevailing on each side of the border may result in different interpretations of terms of the statutes domesticating the Treaty depending on the jurisdiction in which the question is answered. On the Australian side, ambiguous statutory provisions are interpreted in accordance with the common law. On the PNG side, there is a mandate to apply a definition of traditional inhabitant that accords with "customary practice, usage or perception recognised by the people to be affected as a result of the interpretation",[64] as opposed to the common law. This would seem to dictate against the approach that has been taken in neighbouring Solomon Islands, where the courts have held that, at least in relation to divorce proceedings, the test for being an "Islander" is based on domicile.[65] This is despite the fact that the *Interpretation and General Provisions Act*[66] bases qualification as an islander on descent and mode of living.

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61 The Agreed Note is *Reproduced in Law of the Sea*, 11 Australian Yearbook of International Law (1984–1987), 243–193 at 261–262.

62 *Ibid*., 262 at [5].

63 *Ibid*.

64 *Underlying Law Act 2000* (PNG) s 23.

65 *Kevisi v Mergozzi* (Unreported, High Court, Solomon Islands, Cameron LJ, March 18, 2008), available at: <www.paclii.org> at [2008] SBHC 13.

66 *Interpretation and General Provisions Act* (SI) cap 171, s 17(1).

If residence is sufficient, how long must a person reside to qualify, and must residence be continuous? As discussed further below, there is also the question of whether a person who ceases to live in the Protected Zone or the adjacent coastal area remains a traditional inhabitant. This is discussed further below.

4.1.2 Condition (ii): Citizenship of Australia/Papua New Guinea

In the case of both Australians and Papua New Guineans, they must be citizens on the side of the border in which they live. Even this clause may cause problems for a person who does not live in the country of which they are a citizen. This is a particular issue for some Papua New Guineans who, from 1978 to 1979 were offered the choice of returning to Papua New Guinea or becoming permanent residents of Australia on the basis of having lived in Australia for three years.[67] Most who stayed have since been granted Australian citizenship.[68] Australia allows dual citizenship,[69] whilst PNG does not.[70] Accordingly, "traditional inhabitants" must be citizens of one country only; they cannot be citizens of both. As a consequence, Papua New Guineans who have taken Australian citizenship do not qualify as traditional inhabitants as they are not Torres Strait Islanders. In practice, they are treated as traditional inhabitants as the Guidelines specify that they may travel, stating:

> PNG nationals from Treaty villages who become Australian citizens or permanent Australian residents and live in the Protected Zone can still make traditional visits to the PNG Treaty villages.[71]

It is to be noted that only those who "live in the Protected Zone" can take advantage of this concession, and they will still be required to have a travel pass. As discussed below, Papua New Guineans who were traditional inhabitants of treaty villages, but have taken Australian citizenship are also recognised by the Torres Strait Protected Zone Joint Authority ("PZJA") as qualifying to

67 It would appear that those who qualified were placed on an Immigration Task Force Amnesty List: see Torres Strait Protected Zone Joint Authority, *Traditional Inhabitant Identification Form*, p. 2, available at: <https://www.daf.qld.gov.au/__data/assets/pdf_file/0007/63736/Torres-Strait-Trad-Inhabitant-ID.pdf>, accessed January 27, 2019.

68 Murphy (2013), *supra* note 7, p. 238.

69 *Australian Citizenship Legislation Amendment Act 2002* (Cth) s 3, sch 1.

70 *Constitution of Papua New Guinea*, s 64.

71 Department of Foreign Affairs and Trade, *Guidelines for Traditional Visitors Travelling Under the Torres Strait Treaty* (2011), p. 2, available at: <http://dfat.gov.au/geo/torres-strait/Documents/torres-strait-guidelines.pdf>, accessed January 24, 2019.

apply for a traditional inhabitants' fishing licence or fishing boat license under the *Torres Strait Fisheries Act*.[72] In that instance, they may reside in the Protected Zone or the adjacent coastal are of Australia.[73]

4.1.3 Condition (iii): Maintain Traditional Customary Associations with Areas or Features in or in the Vicinity of the Protected Zone in Relation to their Subsistence or Livelihood or Social, Cultural or Religious Activities

The third pre-condition is particularly opaque. It can be broken into three requirements. To qualify, a person must be able to show that they:

(a) maintain traditional customary associations;
(b) with areas or features in or in the vicinity of the Protected Zone; and
(c) in relation to their subsistence or livelihood or social, cultural or religious activities.

With regard to (a), the Treaty does not define the terms "traditional", although it is used frequently throughout the Treaty.[74] The word itself is contentious, arguably condemning customary associations and practices to the past.[75] Nor does the Treaty define "customary associations". However, some assistance can be drawn from the definition of "traditional customary rights" in Article 12. This deals with the reciprocal obligation of traditional inhabitants to allow access and use of areas "in or in the vicinity of the Protected Zones" by traditional inhabitants from the other side of the border. The Treaty specifies that "traditional customary rights of usage and access to and usage of lands, seabed, seas, estuaries and coastal tidal areas" must continue to be permitted provided those rights are "acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition". This suggests that customary associations may be a matter of mutual agreement, rather than something that can be unilaterally asserted.

Further assistance in the search for the precise meaning of maintaining "traditional customary associations" may also, perhaps, be gleaned from the definition of "traditional activities", as a person carrying out such activities

72 *Torres Strait Fisheries Act 1984* (Cth) ss 19(2), 21(1), 24, 25A.
73 Torres Strait Protected Zone Joint Authority (2019), *supra* note 67, p. 2.
74 B. Arthur, *Tradition and Legislation: Analysis of Torres Strait Treaty and Fisheries Act Terms*, report prepared for the Commonwealth National Oceans Office (Centre for Aboriginal Economic Policy Research, Canberra, July 2004), p. 4.
75 *Review of the Native Title Act* (2014), *supra* note 53, para. [118].

would seem to be maintaining customary associations. The Treaty defines "traditional activities" as meaning,

> activities performed by the traditional inhabitants in accordance with local tradition, and includes, when so performed-
>
> (i) activities on land, including gardening, collection of food and hunting;
> (ii) activities on water, including traditional fishing;
> (iii) religious and secular ceremonies or gatherings for social purposes, for example, marriage celebrations and settlement of disputes; and
> (iv) barter and market trade.[76]

Importantly, the definition goes on the say that in "the application of this definition, except in relation to activities of a commercial nature, 'traditional' shall be interpreted liberally".[77] The interpretation of this definition in the Guidelines is itself a matter of controversy, but exploration of this is outside this article. Suffice it to say that engaging in the named activities, such as gardening, fishing, hunting for food, or participating in ceremonies, would all amount to customary associations. Reading this in the light of Article 12, it might also be argued that those activities must also be recognised by those living in or in the vicinity of the area of activity.

This brings us to the meaning of (b), which requires the customary association to be with areas or features "in or in the vicinity of the Protected Zone". The phrase, "in or in the vicinity of the Protected Zone" is defined in the Treaty as "an area the outer limits of which might vary according to the context in which the expression is used".[78] The imprecision of this term was addressed in the discussions held in preparation for ratification of the Treaty, and recorded in the Agreed Note,[79] referred to above. It was noted in the discussions that,

> the specifying by name of villages as being "in the vicinity" could create practical difficulties, for example, for allowing freedom of movement, because associated villages or nearby garden areas or transit routes would not be covered. For this reason it was preferable to specify, where practicable, an area demarcated by a line. However, it was reasonable to specify villages where these were self-contained and no problem of access was likely to arise (e.g. where access was directly from the sea).[80]

Accordingly, for the purpose of the definition of traditional inhabitant in Article 1(m) and for Articles 11 (area of free movement), 12 (traditional customary

76 *Torres Strait Treaty*, art. 1 (k).
77 *Ibid*.
78 *Ibid*., art. 1.3.
79 See *Law of the Sea* (1984–1987), *supra* note 61.
80 *Ibid*., [6].

rights), 16 (border control) and 18 (inspection and enforcement) the definition was stated as follows:

> In relation to Australia the "vicinity" would be the area of Australian jurisdiction outside the Protected Zone between the meridians of longitude 141°E and 145″E and north of the parallel of latitude 10°30′S. In relation to Papua New Guinea the "vicinity" would be the area of Papua New Guinea jurisdiction outside the Protected Zone and south of the parallel of latitude 9′s and west of the meridian of longitude 144″E together with the whole of the remainder of Parama Island and the villages of Sui and Sewerimabu, subject to the possibility of further areas being included...[81]

It was agreed that the "vicinity" would be broader for the purpose of other treaty provisions,[82] so as to allow for consultation between the two countries on policy.[83] As mentioned above, it was also agreed that further investigation should be made into whether any other areas should be included in relation to Papua New Guinea, and that the areas referred to in the Agreed Note were subject to change by mutual agreement between Australia and PNG.[84]

4.2 Limitation of the "Adjacent Coastal Area"

As discussed above, in order to qualify as a traditional inhabitant, the Treaty requires a person to live "in the Protected Zone or the adjacent coastal area of" Australia or PNG. However, the islands and villages included in the "adjacent coastal area" were not originally specified. This loose arrangement had the advantage of accommodating groups on the Papua New Guinea side of the border, which did not always conform to a pattern of settled communities.[85] It also avoided confronting the issue of displacement of coastal Trans Fly people by Kiwai people from the Fly River Estuary, which had taken place over several decades prior to colonisation.[86] As discussed above, in 1984, the term was clarified by reference to degrees of longitude and latitude, rather than by reference to places, although the island of Panama and the villages of Sui and Sewerimabu were said to be included. According to Murphy, a list of Treaty Villages may have been provided by PNG to Australia in 1984.[87] However, there

81 *Ibid*., [3].
82 See, e. g. the reference to "vicinity in *Torres Strait Treaty*", arts 10.4 and 13.1.
83 See *Law of the Sea* (1984–1987), *supra* note 61, [4].
84 *Ibid*., [5].
85 Murphy (2013), *supra* note 7, pp. 40–41.
86 *Ibid*., 29–30.
87 *Ibid*., 239.

does not appear to be a copy of this list in existence,[88] and it is possible that this is a confusion with the 1984 Agreed Note. The Senate Report refers to comments from Murphy,

> In the early years of the operation of the treaty, people were left basically to self-identify. Torres Strait Islanders know who the people are who they have had traditional relationships with, so there are interpersonal connections that allow people to say who it is.[89]

Whilst this flexibility might have worked well for insiders, that is, the Traditional Inhabitants themselves, it was obviously not so easy for government officials concerned with border control. In its report on its tenth meeting in 1999, the Torres Strait Joint Advisory Council[90] noted that Australia and PNG would exchange notes to formalise the list of Treaty Villages.[91] Subsequently, Australia approached PNG requesting clarification of the villages on the PNG side of the border which were included under the treaty.[92] This resulted in a formal Exchange of Notes in 2000,[93] which was much more prescriptive. The formal note from Australia was sent to Papua New Guinea on June 28, 2000,[94] limited free movement by Papua New Guineans to traditional inhabitants from 13 PNG villages: Bula, Mari, Jarai, Tais, Buji/Ber, Sigabadaru, Mabadauan, Old Mawatta, Ture Ture, Kadawa, Katatai, Parama and Sui as being included.[95] There is no mention of any "adjacent area" and Daru, which was then the administrative centre of the Province was not included. Papua New Guinea exchanged its note with Australia on July 26, 2000, merely confirming the understanding that those were the relevant villages.

If the Exchange of Notes is binding, only inhabitants of the named villages can qualify as "traditional inhabitants". In fact, its legal status is not entirely clear. As the Exchange of Notes was an agreement in written form between nation-states it can qualify as a treaty in its own right. On the other hand, it may be a memorandum of understanding, which does not normally have legal

88 *Ibid*., 239.

89 *The Torres Strait: Bridge and Border* (2010), *supra* note 12, para. [18.13], citing Murphy, *Committee Hansard* (June 18, 2010), p. 43.

90 The Torres Strait Joint Advisory Council is established by the Treaty article 19, and consists of 9 members, three of whom represent traditional inhabitants, with the rest representing the relevant governments.

91 Exchange of Notes; Australia to PNG June 28, 2000; PNG to Australia July 25, 2000, para. 1.

92 *The Torres Strait: Bridge and Border* (2010), *supra* note 12, para. [18.14].

93 Exchange of Notes; Australia to PNG June 28, 2000; PNG to Australia July 25, 2000.

94 Note 769/2000.

95 Department of Foreign Affairs and Trade, *The Torres Strait Treaty*, available at: <http://dfat.gov.au/geo/torres-strait/Pages/the-torres-strait-treaty.aspx>, accessed January 24, 2019.

consequences. Its status does not depend on the title of the document, but on whether the intention of the parties, as reflected in "its actual terms and ... the particular circumstances in which it was drawn up,[96] is to establish a relationship governed by International Law".[97] The Australian High Commission in Papua New Guinea[98] and DFAT refer to the Exchange of Notes as a memorandum of understanding and use this as a basis for claiming that it is confidential.[99] The convention is to commence a treaty with the words "shall constitute an agreement", whereas a memorandum of understanding commences with, "records the understanding".[100] The Exchange of Notes is framed as an understanding, so would appear to fall into the category of a memorandum of understanding. As mentioned above, under the Vienna Convention a subsequent agreement between parties may be taken into account in interpreting the Treaty,[101] so, at the very least, the Exchange of Notes may be used in this way.

In the Exchange of Notes, the Australian High Commissions proposed that the list of villages should be included in the Guidelines, and this has been done. The Guidelines combine the restriction on villages from the Exchange of Notes with the restriction on the extent of travel from the Agreed Note. They state that:

> PNG traditional inhabitants come from Bula, Mari, Jarai, Tais, Buji/Ber, Sigabadaru, Mabadauan, Old Mawatta, Ture Ture, Kadawa, Katatai, Parama and Sui (the 13 PNG Treaty Villages). They can make traditional visits (free movement without passports) into the Protected Zone. PNG traditional inhabitants can travel south into Australia as far as the 10 degrees 30 minutes South latitude (near Number One Reef).

In addition to repeating the names of the 13 PNG villages from the Exchange of Notes, the Guidelines go further, by restricting Australian traditional inhabitants to people from a list of 14 Torres Strait Islands:

96 *Aegean Sea Continental Shelf* [1978] ICJ Reports 39, [96].

97 *Vienna Convention, supra* note 16, art 2(1)(a).

98 Email from Consular Manager, Australian High Commission, Papua New Guinea, January 20, 2017.

99 Email from DFAT to UQ library, January 17, 2017.

100 A. Aust, *Handbook of International Law* (New York: Cambridge University Press, 2010), p. 52.

101 *Vienna Convention, supra* note 16. Article 31(3)(a) states "There shall be taken into account, together with the context:(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation..."

> Australian traditional inhabitants come from Badu, Boigu, Poruma (Coconut Island), Erub (Darnley Island), Dauan, Kubin, St Pauls, Mabuiag, Mer (Murray Island), Saibai, Ugar (Stephen Island), Warraber (Sue Island), Iama (Yam Island) and Masig (Yorke Island). They can make traditional visits to the PNG Treaty Villages and travel north as far as the 9 degrees South latitude (just north of Daru).

Horn Island, which houses the international airport and police headquarters, and Thursday Island, the administrative centre, are not included. Neither is there any mention of "adjacent area", so presumably all villages on mainland Australia are excluded. As discussed below, the Guidelines are not binding in law, but in practice they found administrative enforcement of the Treaty.[102]

A further limitation on the meaning of "traditional inhabitant" has been imposed by the *Fisheries (Torres Strait Protected Zone) Act* (PNG), which incorporates the Treaty provisions relating to control of fisheries into PNG's municipal law. The Act defines traditional inhabitants in essentially the same terms as the Treaty, but in relation to PNG restricts the citizenship qualification to persons who are "automatic citizens".[103] If taken literally, this is a severe restriction, as automatic citizenship is only conferred on those:

(i) born in PNG before Independence Day who have two grand-parents born in the country or an adjacent area[104];

(ii) born outside the country before Independence Day who have two grand-parents born in PNG and who apply to be registered as a citizen within a year after Independence, renounce other citizenships and make the Declaration of Loyalty.[105]

This would mean that anyone born after Independence cannot qualify as a traditional inhabitant. It appears more likely that the phrase automatic citizen was intended to include not only those who gained automatic citizenship at independence, but also those who acquire citizenship by descent after that date.[106] In other words, the term was intended to exclude citizens by naturalisation.[107]

The *Fisheries (Torres Strait Protected Zone) Act* also provides that PNG traditional inhabitants may come from an "area adjacent to the Protected Zone

102 For an example of the conflict arising from the exclusion of certain villages from the Treaty arrangements see the case study of the violent encounters between villagers from Masingara (a non-Treaty Village) and Old Mawatta (a Treaty Village): Murphy (2013), *supra* note 7, pp. 252–254.

103 *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG) s 2.

104 This is defined to mean Solomon Islands, Irian Jaya, the islands in the Torres Strait: *Constitution of Papua New Guinea*, s 65.

105 *Ibid*.

106 *Ibid*.

107 *Ibid*., s 67.

... declared by the Minister, by notice in the National Gazette, to be part of the adjacent coastal area of Papua New Guinea".[108] Thus, the Act confers on the PNG's Minister the power to specify what is meant by "adjacent coastal area" on the PNG side. Whilst, theoretically, this could be done unilaterally, this would not be within the spirit or letter of the Treaty. In fact, it does not appear that any such notice has been issued, but it is hard to say this categorically as Gazettes are not easily accessed.[109]

4.3 Practical Arrangements

In practice, the free movement provisions are restricted by the Guidelines for Traditional Visitors (the "Guidelines"), which were introduced in 2009 and revised in 2011.[110] The Senate Report on the Torres Strait states that the Guidelines were an initiative of the Traditional Inhabitants Meeting, and that they were "created by and for the traditional inhabitants and subsequently endorsed by the JAC".[111] The Guidelines provide detail regarding the Treaty arrangements. For example, as discussed below, the Guidelines specify the villages that are caught by the agreement.

Whilst the Guidelines are not law in the strict sense, in practice, they are more relevant than hard laws. As mentioned above, the restriction of the free movement provisions to the 13 PNG Treaty Villages is a matter of extreme contention,[112] To a more limited extent, the limits on the Torres Strait Islands are also contentious and their legal validity is questionable.

The other practical arrangement of relevance is the "visitor pass system". Whilst traditional inhabitants travelling between PNG and the Torres Strait Islands do not require a passport or visa, they must obtain a pass from their Island Councillor on Torres Strait Islands or village chairman in their treaty village in PNG.[113] To this

108 *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG) s 2.

109 There is no record of such a notice in the Gazettes from 1984 to 1986, 1988 to 1989, 2010 to 2014 (available at: http://www.paclii.org/pg/other/PGGovGaz/), or 1991 to 2000 (available at the National Library of Australia).

110 Department of Foreign Affairs and Trade (2011), *supra* note 71; *The Torres Strait: Bridge and Border* (2010), *supra* note 12, p. 23.

111 *The Torres Strait: Bridge and Border* (2010), *supra* note 12, 23. "JAC" is the Joint Advisory Council.

112 Murphy (2013), *supra* note 7.

113 Department of Immigration and Citizenship, submission to Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Torres Strait: Bridge and Border* (Canberra, 2010), p. 7.

extent, the practical arrangements introduce a condition of community recognition into the conditions for being a traditional inhabitant. The signed pass must be sent to the relevant community before visiting.[114] The Island Councillor or village chairman in the community to be visited may accept or decline the application for a pass.[115] The pass does not have any photo identification attached and the Senate Committee recommended that DFAT should take the lead in the use of modern technologies to improve the means of identification of persons crossing the border.[116]

It is also of note that there is a separate system of identification operating on the Australian side of the border in relation to applications to the Torres Strait Protected Zone Joint Authority ("PZJA") under the Torres Strait Fisheries Act for a traditional inhabitants fishing licence or fishing boat license.[117] Such applications require a paper form to be completed by the applicant and a Mayor and Councillor from the same Council, who must declare that the applicant falls into one of three categories[118]:

> A Torres Strait Islander who lives within the Protected Zone or an adjacent coastal area of Australia and is an Australian citizen who maintains traditional customary associations with the area in relation to subsistence or livelihood or social, cultural or religious activities.
>
> An Aboriginal traditional inhabitant of the Torres Strait or the northern peninsula are as defined under the Torres Strait Treaty and who is resident of that area.
>
> A Papua New Guinea traditional inhabitant from the PNG area of jurisdiction of the Protected Zone who is now an Australian citizen and resides in the Protected Zone or adjacent coastal are of Australia who was granted permanent residency status under the 1978/79 Immigration Taskforce Amnesty List. Or is a descendent of such a person.

Persons claiming under the first two categories may be requested by the Councillor, Mayor or the PZJA to supply a family tree, and/or other evidence to support the claim that they reside in the specified areas. Persons claiming to belong to the third category must attach a letter of confirmation from the Department of Immigration and Border Protection. If they are a descendent of

114 Department of Foreign Affairs and Trade (2011), *supra* note 71.

115 TSRA Submission to Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Torres Strait: Bridge and Border* (Canberra, 2010), para [18 10].

116 *The Torres Strait: Bridge and Border* (2010), *supra* note 12, para. [19.7].

117 *Torres Strait Fisheries Act 1984* (Cth) ss 19(2), 21(1), 24, 25A. For a copy of the form, see https://www.daf.qld.gov.au/__data/assets/pdf_file/0007/63736/Torres-Strait-Trad-Inhabitant-ID.pdf.

118 These criteria are also set out in S. Taylor, J. Prescott and J. Kung (eds.), *A Guide to Management Arrangements for Torres Strait Fisheries* (Australian Fisheries Management Authority, June 2004), Appendix 2.

such a person they must also attach their birth certificate and evidence that they are related to the person mentioned in the confirmation letter.

The form states that is "used to verify the 'traditional inhabitant' status (as defined in the *Torres Strait Fisheries Act 1984*, and decisions of the Protected Zone Joint Authority)". Whilst the first category of traditional inhabitant under these arrangements coincides with the definition in the Treaty, the second and third do not. The Torres Strait Fisheries Act defines traditional inhabitant by reference to the Treaty, but includes other persons prescribed by regulations. The *Torres Strait Fisheries Regulations 1985*[119] do not include any further definition. Accordingly, it would appear that these additional categories originate from the decisions of the PZJA. This is borne out by the "Guide to Management Arrangements for Torres Strait Fisheries", which states in a footnote[120]:

> The PZJA following consultation with Australian traditional inhabitants determined that for the purposes of fisheries management it would extend that definition to also include former PNG nationals who were granted amnesty in 1978 and their descendants, and to aboriginal people living in the adjacent coastal area (Northern Peninsula Area) who are generally the traditional owners of that area.

4.4 Can the Status of Traditional Inhabitant be Lost?

The first pre-requisite requires a person to "live" in the Protected Zone or the adjacent coastal area. As discussed above, the meaning of "live" is unclear, but on a literal interpretation current residence is required. This suggests that the status of traditional inhabitant will be lost if a person moves to live outside this area. This question is likely to become more pertinent due to post-Treaty developments, such as increased mobility and displacement due to sea level rise and pollution.[121] Similarly, if traditional inhabitants lose their citizenship, according to the literal interpretation of the Treaty, they would no longer qualify as living within the relevant area. In practice, however, it appears that this is not necessarily the case. Firstly, as discussed above, the Guidelines provide that "PNG nationals from Treaty villages who become Australian citizens or permanent Australian residents and live in the Protected Zone can still make traditional visits to the PNG Treaty villages".[122]

119 As at June 16, 2016.

120 Taylor, Prescott and Kung (2004), *supra* note 118, p. 3, fn. 1.

121 See further, A. Dundon, *Mines and Monsters: A Dialogue on Development in Western Province, Papua New Guinea*, 13 Australian Journal of Anthropology, no. 2 (2010), p. 139.

122 Department of Foreign Affairs and Trade (2011), *supra* note 71, p. 2.

Further, there is a limited number of additional peoples from both sides of the border allowed to take advantage of the free movement provisions.[123] The basis for this appears to be that they are members of "displaced communities",[124] originating from islands and villages within the Treaty provisions, and thus, still recognised as traditional inhabitants. Those recognised on the Australian side are Torres Strait Islander living in the Northern Peninsula area of Cape York who were displaced from Saibai Island before the Treaty was signed, following high tide activity and inundation of traditional lands. On the PNG side, the communities are in areas of Daru, known as Mabadauan/Old Mawatta Korner; Ture Korner; Parama Korner; and Daru Pioneers, who are descendants of the earliest settlers on Daru. This practical arrangement was noted by the Senate Committee, but does not appear to have any documentary basis. However, this recognition does not extend further back in history to accommodate the Trans Fly groups who claim to have been displaced by the expansion of the Kiwai people.[125]

It may be that this question should be approached in the context of the third prerequisite for being a traditional inhabitant. If a person no longer lives in the required area and/or is no longer a citizen, the fact that he or she maintains "traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to ... subsistence or livelihood or social, cultural or religious activities" should overcome any shortfall in qualification caused by a literal interpretation "live" or a change of citizenship.

Another way of approaching the question, which would yield a similar outcome, is by reference to the Underlying Law Act of PNG, which states that a person, "ceases to be a member of a community if he adheres or adopts the way of life of another community or is accepted by some other community as a member of that community".[126] Again, a person who continues as a member of a community would be regarded as a traditional inhabitant irrespective of residence or citizenship.

5 Conclusion

As it stands, the definition of Traditional Inhabitants under the Treaty raises more questions than it answers. In practice, the definition in the Guidelines has been

123 Department of Immigration and Citizenship (2010), *supra* note 113, p. 6.

124 *Ibid*., 7.

125 For a detailed discussion of the history of migration and occupation of land in the vicinity of the coast of Papua New Guinea prior to colonisation, see Murphy (2013), *supra* note 7, pp. 40–49.

126 *Underlying Law Act 2000* (PNG) s 1(2)(b).

allowed to prevail in determining whether a person is or is not included. The vast majority of cross-border movement is by Papua New Guineans travelling to the Australian islands of the Torres Strait.[127] In the Treaty villages on the PNG mainland there is virtually no control of entry by the State. Accordingly, enforcement of the Treaty is carried out almost exclusively by Australian border forces and a limit on those qualifying to enter appears to suit them.[128] The restricted interpretation of traditional inhabitants is thus arguably more of a political outcome than a rational approach to determination of those with a legitimate claim to inclusion.[129]

The question of extending the application of the free movement provisions to additional villages was left open in the Agreed Note of 1984 and in the Exchange of Notes in 2000. Since then the matter has been raised on several occasions. In particular, the Senate Committee

> received submissions from a number of villages from the neighbouring region in PNG claiming that they have, and continue to have, legitimate rights in the Treaty area: that they were engaged in traditional cross-border movements long before PNG's independence. They produced detailed accounts of their strong and long-standing links to the strait.[130]

However, the Committee considered that "any changes to the status of Treaty villages should be initiated by the PNG Government", and considered it sufficient to make the Australian Government aware of the fact that some villages maintained that they should be included and had evidence to support this.[131]

The Treaty was heralded as establishing:

> [a] Protected Zone in the Torres Strait to protect the traditional way of life and livelihood of traditional inhabitants of both countries who live in or near the Strait. The traditional inhabitants will be able to continue to carry out their traditional activities, including traditional fishing, and to move freely about the Zone for this purpose.[132]

However, it would seem that the approach to the meaning of "traditional inhabitant" has moved from its intended purpose of protecting "the traditional way of life of Torres Strait Islanders and the coastal people of PNG who live

127 Department of Immigration and Citizenship, *supra* note 1.
128 The Senate Committee did not recommend any refinement of the definition.
129 See further, Murphy (2013), *supra* note 7, pp. 248–256.
130 *The Torres Strait: Bridge and Border* (2010), *supra* note 12, para. [18.15].
131 *Ibid*., para. [18.25].
132 Attachment to M.E. Lyon and R.J. Smith, "The Torres Strait Treaty: Aspects of Implementation" in P.J. Boyce and M. White (eds.), *The Torres Strait Treaty* (Australian Institute of International Affairs in association with ANU Press, 1981), pp. 26, 40 (the authors were both representatives of the Department of Foreign Affairs).

adjacent to the Torres Strait,"[133] to be governed by rigid Guidelines that impose arbitrary limits. Whilst this rigid approach may conform to a positivist view of tradition that is fixed in the past, it does not coincide with the modern approach to customary law which was embraced in Papua New Guinea,[134] if not in Australia.[135] Nor does it coincide with international jurisprudence on self-determination and the right to govern culture and resources.[136] In particular, it is out of step with the approach of the United Nations, Permanent Forum on Indigenous Issues, which is to identify, rather than define indigenous peoples and the criteria it has developed to encapsulate the modern understanding of the term indigenous.[137]

It is now 40 years since the Treaty was signed and 140 years since the last islands were annexed to the Colony of Queensland by letters patent.[138] In neither case were the country borders established on the basis of geographical or cultural connection. During and since that time there have no doubt been significant changes in the landscape and culture of the Torres Strait and surrounding mainland areas, which lend further force to the argument for revisiting the meaning of traditional inhabitant, including the areas from which they must come. Until this issue is resolved tension will continue to simmer, and the Treaty will be prevented from achieving the aspiration, expressed in the preamble, of recognising:

> *the importance of protecting the traditional way of life and livelihood of Australians who are Torres Strait Islanders and of Paua New Guineans who live in the coastal areas of Papua New Guinea in and adjacent to the Torres Strait.*[139]

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133 Department of Foreign Affairs and Trade (2011), *supra* note 71, p. 1.

134 See, e. g. the *Underlying Law Act 2000* (PNG), sch. 1.1.2, which, as discussed above, gives customary law precedence over common law and the definition of custom in the Constitution, which severs it from the common law concept of "time immemorial".

135 See, e. g. the emphasis on descent in the *Native Title Act 1993* (Cth), discussed above.

136 *Charter of the United Nations; International Covenant on Economic, Social and Cultural Rights*, opened for signature December 16, 1966, 993 UNTS 3 (entered into force January 3, 1976); *International Covenant on Civil and Political Rights*, opened for signature December 16, 1966, 999 UNTS 171 (entered into force March 23, 1976); *Vienna Declaration and Programme of Action*, GA ec 157/23, UN Doc A/CONF.157/23 (July 12, 1993, adopted June 25, 1993); *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN DOC A/RES/61/295 (October 2, 2007, adopted September 13, 2007), preamble, art. 3.

137 United Nations Permanent Forum on Indigenous Issues, *supra* note 56.

138 Letters Patent 1879, *Queensland Government Gazette*, October 10, 1879.

139 See also *Torres Strait Treaty*, art. 10, para. 3, which states that the "principal purpose" of the Protected Zone is the protection of the traditional way of life and the livelihood of the traditional inhabitants.

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