Exploring Right to Reparation of Indigenous Peoples: A Comparative Study between Land Claims in USA and International Perspectives

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Abstract: **The centuries-long Native American's history of forced dispossession, relocation, land-grabbing poses significant challenges to their property rights even at present.[1] Beginning from the 15th century to the present, the journey of land-theft and forced dispossession of native Americans continued and colonial governments legalized the loss of land via the doctrine of discovery, conquest, terra nullius, and congressional plenary power.[2] The Native American communities still encounter the infringements of their most basic land rights with which native people have extraordinary, unique relationship.[3] Tribal peoples' close ties with land such as the Standing Rock Sioux Tribe determines their ways of life, reflects their culture, values, spirituality and physical existence. Dispossession is destructive not only to their physical structures, but also it damages their mental stability, belief, religious sentiment and after all their physical as well as spiritual world.**

I. INTRODUCTION

The main purpose of this paper is to compare the identified approaches of international forums particularly Inter-American Court of Human Rights (IACHR) and the United States judiciary and commission (Indian Claims Commission and Court of Federal Claims) in case of land-dispossession. The objectives of this paper are to (1) assess the universal standards for the right to reparation of indigenous communities when their land is taken by state or federal government against their will, (2) analyze the essential factors that lie beneath land-grabbing, and (3) examine aspects how government treats native peoples in response to past wrongdoings to assess the right to reparation.

This article argues that the methods and criteria applied in measuring reparations for Native American's land rights and natural resources violation are very much limited as compared with approaches of Inter-American Court of Human Rights (IACHR). In particular, the jurisprudence of determining appropriate remedies as evidenced in the records of this regional court (IACHR) is comprehensive and corresponding with past injustices and harms experienced by indigenous communities. The purpose of this research paper is to identify the international standards for the determination of indigenous peoples' right to reparation and assess the United States perspectives. The first part of the paper will focus on the universal standards of assessing right to reparations applicable in broadly human rights violations and specifically land grabbing including natural resources. The second part of the paper will deal with the prevailing international jurisprudence in this arena and approaches of IACHR that evolved over time. The third and final part will assess aspects of land claims and legal barriers associated with reparations in the United States and compare the circumstances with international standards for the determination of reparations in property rights.

II. EVOLVING UNIVERSAL REPARATIONS STANDARDS FOR INDIGENOUS PEOPLES IN TERMS OF HUMAN RIGHTS VIOLATIONS

A pivotal principle of international human rights law is right to reparations of any person, or community. Whenever people suffer from violation of human rights, the circumstance demands healing the past wrongdoings and reparations. Reparation does not only mean monetary damages; it includes other forms of damages too. The United Nations (UN) system has advanced some good pieces of legislations either Conventions or Recommendations that specifically focus on reparation right in terms of human rights infringements. Although many of the instruments do not oblige states directly, but those establish normative standards for states to consider.

2.1 The UN Approach to Human Rights Violation and Property Rights

The universal standard for reparations in case of human rights violations recognized in the International Law Commission's Draft Articles on the Responsibility of States

[1] *See* William D. Wallace, Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*, Oxford University Press, 2005, 29 Am. Indian L. Rev. 447, 449 (2005).

[2] *See* Rachael Faithful, *An Idea of American Indian Land Justice: Examining Native Land Liberation in the New Progressive Era*, 67 Nat'l Law. Guild Rev. 193, 205 (2010). *See also* Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 Tex. L. Rev. 859, 866 (2016); Blake A. Watson, *The Doctrine of Discovery and the Elusive Definition of Indian Title*, 15 Lewis & Clark L. Rev. 995, 1014 (2011); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 Alb. Gov't L. Rev. 1, 20 (2017).

[3] *See* John P. La Velle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 Great Plains Nat. Resources J. 40, 63 (2001).

for Internationally Wrongful Acts (ILC Articles) emphasizes that reparations must correlate with the degree of harm proven before the court.[4] The analysis of different provisions of ILC Articles has made one principle clear that courts must adopt the victim-centered approach to overcome the complex challenges of appropriate remedies.[5] For example, participation of victims and their Community in the decision-making process promotes the implementation of Court's order in a meaningful way. In land context, the challenges of land-demarcation and land-title (customary in nature) may be remedied by the judicial institution via involvement of community people in the process.[6] The *Moiwana* court ordered restitution of traditional land and included the petitioners and the community people in the frontier definition process to resolve the dispute of land border.[7] Here, restorative justice matters a lot to "empower victims to define the restoration that matters to them."[8] Therefore, international standards of reparations consider holistic approach such as victim's needs, monetary damages, non-monetary damages (cession and non-repetition) etc. that are related to established violations.[9] Victim-centered approach and holistic approach complement each other. Land restoration even fundamental in many aspects is not sufficient in all circumstances. Sometimes, the court needs to address the deep-seated discrimination of indigenous communities by dominant sections of society.[10] In presence of administrative malpractice and discriminatory law, the court orders enactment of legislation or training programs for government officials.[11] Since the court involves in the process of implementing the decision in a meaningful way, its supervision also includes overseeing state-compliance. Any vague guidelines for legislative reform or training will be futile without meaningful execution of orders.[12] Only calling for adapting to international human rights norms would be terminal for communities to get suitable redress as there is every chance for state-officials to be evaded from legal obligation.[13]

Similarly, medical and psychological treatment as part of reparations is an arduous action for courts. Depending on the nature of wounds and injuries, the court orders to healing in public medicals or institutions for traumatized victims rather than just direct payment of monetary compensation.[14] Generally, the court orders to reduce the costs of state but simultaneously its implementation is associated with problems of proper facilities in public hospitals or lack of mechanism or training to treat traumatized victims. Difficulties are intensified in indigenous contexts due to distinct cultural and linguistic barriers and unfamiliar traditional treatments.[15]

Full participation of victims is an emerging concept to overcome 're-victimization of indigenous communities and a retrenchment of inequitable conditions.'[16] If the court's effort of demarcation and restoration took place without community's participation and concern, the decision of court will remain unenforced and would aggravate further damage and suppression.[17] Also, mere participation is not enough to remedy breach of human rights; it should be effective and capable to come across the existing challenges. Consultation in presence of court and commission helps avoid easy-exploitation.[18] Even though there is every possibility of manipulation of the 'effective consultation' mechanism, involvement of court rather than only state or agency in the consultation process facilitates to overcome the challenges effectively and promptly.

Legal obligation of states is the most crucial factor for the aggrieved persons or communities to get restorative justice. Article 31 of ILC Articles deals with reparations that obliges state for an internationally wrongful act.[19] States are responsible to cease the act, offer guarantees, and make full reparations whether material or moral to remedy the injustices or injuries.[20] The commentary (Article 31) while referring Factory at Chorzow case of Permanent Court of International Justice (PCIJ) explains that reparations must cease to exist the

[4] Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC Articles].

[5] *See* John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. R EV. 1727, 1744 (1999).

[6] *See* Ariel E. Dulitzky, *When Afro-Descendants Became "Tribal Peoples": The Inter-American Human Rights System and Rural Black Communities*, 15 UCLA J. INT'L L. & FOREIGN AFF. 29, 49-52 (2010).

[7] *See* Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, P 210 (June 15, 2005).

[8] *See* Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples*, 25 Duke J. Comp. & Int'l L. 1, 4 (2014).

[9] *Id*.

[10] *See generally*, Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* 1-2 (2010). *See also* Patrick Thornberry, *Indigenous Peoples and Human Rights* 18-20 (2002).

[11] *See* Caroline Bettinger-López, *The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case*, 15 CUNY L. REV. 315, 334 (2012).

[12] *See*, e.g., López-Álvarez v. Honduras, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, P 210 (Feb. 1, 2006)

[13] *See* Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, P 85 (Feb. 22, 2002).

[14] *See generally*, Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 304-316 (2011).

[15] Nieves Gómez, *Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities, in Reparations for Indigenous Peoples: International and Comparative Perspectives* 143-147 (Federico Lenzerini ed., 2008).

[16] *See* Thomas M. Antkowiak, *supra* note 8 at 56.

[17] Barbara Rose Johnston & Holly M. Barker, *Consequential Damages of Nuclear War: The Rongelap Report* 184 (2008) (referring generally to the lasting significance of ancestral lands).

[18] *See generally*, Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 160 (2013).

[19] *See* William D. Wallace, Lindsay G. Robertson, *supra* note 1.

[20] *See* Dinah Shelton, *Remedies in International Human Rights Law* 7, 87, 114 (2d ed. 2005).

violations and restore the situation as it was earlier.[21] The leading principle of "no right without a remedy" derived from the 1928 holding of the PCIJ in the Chorzow Factory case.[22] "It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[23] This '*restititio in integram'* is recognized in both international and regional human rights instruments.[24] Where full restitution is not possible depending on situations, satisfaction plays a pivotal role to mitigate the damage as contemplated in Article 37(2) of ILC Articles.[25] This may include acknowledgement of violations, formal apology, formal expression of regret or other appropriate form of satisfaction.[26] Thus, human rights treaties directly govern remedial rules and authorize international or regional courts to implement judicial remedies. For instance, article 63(1) of the American Convention on Human Rights requires the Inter-American Court of Human Rights to order fair or adequate remedy if any provision of the convention is infringed. The Inter-American Court, for instance, has held that Article 63(1) codifies the Chorzow Factory rule. In its first merits case, the Court specified: "Reparation of harm brought about by the violation of an international obligation consists in full restitution… which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages."[27]

The Basic Principles adopted by the United Nations General Assembly in 2005 delineates cessation, non-repetition, restitution, compensation and satisfaction as right to a remedy and reparations for victims of gross violations of international human rights law.[28] The Basic Principles clarify those methods of reparations. Restitution, as per the Principles, refers to restoration of the victims to its original position such as restoring the confiscated property to its owners. Similarly, rehabilitation denotes not only medical and psychological care, but also legal and administrative reforms and developmental programs.[29] In addition, satisfaction contemplates apologies, public disclosure of truth, judicial and administrative sanctions etc.[30] Guarantees of non-repetition suggests legal reform and human rights training program since legal reform stops discriminatory practices and training program enlightens the state-officials from heart to cease human rights abuse.[31]

The United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP) contemplates specific remedies for forced relocation.[32] The prerequisites for forced relocation of indigenous peoples and communities are free, prior and informed consent of the indigenous peoples and on an agreement of just compensation.[33] The remedy also includes restore or return to land.[34] Subject to the land or natural resources being used or damaged, compensation covers not only monetary damages, but also restitution, restoration and other appropriate form of redress.[35] Here, the judge is entitled to apply discretionary power to assess proper reparations considering proper situation.

Assessing different state reports and complaints, the UN Special Rapporteur on Indigenous Rights have proposed extensive remedies based on environmental impact, productive capacity, social-cultural-economic-spiritual way of life.[36] Broadly, various pronouncements of international and regional courts demonstrate and establish universal standard for reparations.[37] First, the court may order restoration or restitution of the situation prior to human rights violation.[38] Second, reparations may include monetary damages for pecuniary as well as non-pecuniary losses for human rights

[21] *See* Factory at Chorzów (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928).
[22] *See* Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. Rev. 693, 699 (2008).
[23] *Id.*
[24] *See*, e.g., Avena (Mex. v. U.S.), 2004 I.C.J. 12, 25 (Mar. 31, 2004); Barberà v. Spain, 285 Eur. Ct. H.R. (ser. A) 50, 57 (1994); Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, P 170 (June 15, 2005).
[25] *See* Dinah Shelton, *supra* note 20 at 103, 150.
[26] ILC Articles, *supra* note 4, art. 37(2).
[27] *See* Sonja B. Starr, *supra* note 22 at 701, 702.
[28] G.A. Res. 60/147, U.N. Doc A/RES/60/147, at 1 (Mar. 21, 2006) [hereinafter Basic Principles].
[29] *Id.*
[30] *Id.*
[31] Basic Principles, *supra* note 28, at P 23.
[32] *See* Article 10, 11, 18, 19, 26, 28 of UNDRIP (2007).
[33] As per Article10 of UNDRIP, Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Art.18 of UNDRIP contemplates that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Art. 19 provides that States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
[34] *See* Article 10, UNDRIP.
[35] Art. 28 of UNDRIP. It provides that 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
[36] *See* U.N. H.R. Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, P 75, U.N. Doc. A/HRC/15/37 (July 19, 2010) (by James Anaya) (referring to the various harms of extractive industries).
[37] *See generally*, García Cruz and Sánchez Silvestre v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 273, P 70 (Nov. 26, 2013) (demonstrating approval of a friendly settlement); Gudiel Álvarez ('Diario Militar') v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, P 350 (Nov. 20, 2012) (imposing the obligation to investigate the forced disappearances and the alleged detentions, torture, and presumed execution of victims).
[38] *Id.*

violations.[39] Third, subject to the victim's continuation of physical and psychological harms, the court can order rehabilitation covering medical and psychological care.[40] Fourth, the reparations as satisfaction comprises public apology and acknowledgement of responsibility for human rights infringements.[41] Fifth, the court may direct for investigation of constant human rights violations.[42] Last, court may ensure non-repetition and order to take measures to be precluded from violation or invasion.[43]

Convention No. 169 of the International Labor Organization contemplates a group of rights dealing with land claims such as recognition of ancestral lands, natural resources, recognition of customs and traditions and so forth.[44] This is the legally-binding instrument that covers comprehensive protection of indigenous human rights and land claims. For example, article 6 entails the right to consultation with indigenous peoples if any legislative or government measures deprive them directly.[45] Also, article 6(1)(b) and (c) imposes responsibility upon government to devise measures and institutions for the participation of all indigenous communities at all levels of decision-making.[46] In addition, article 6(2) establishes benchmark to apply consultation requirement such as "in good faith and in a form appropriate to the circumstances" and "objective of achieving agreement or consent to the proposed measures."[47] Besides this broad and general requirement to consult, article 2 provides indigenous people's participation in developing "coordinated and systemic action" to protect the rights of indigenous peoples.[48]

2.2 The Regional Approach (Organization of American States) to Indigenous Property Rights

American Convention on Human Rights (1969) is the fundamental instrument that recognized indigenous peoples' property rights.[49] Indigenous property right is not an absolute right. There are benchmarks to balance the interests of both states and indigenous communities. Since this provision has a elaborate discussion in next section, it is not analyzed here extensively.

With almost thirty years of negotiations and advocacy, Organization of American States (OAS) adopted American Declaration on the Rights of Indigenous Peoples on June 15, 2016. This regional human rights instrument documented a bundle of collective rights including land claims of indigenous peoples.[50] Article XXV focuses on traditional forms of property and cultural survival, right to land and resources. The spiritual, physical and material connection with indigenous peoples are acknowledged and protected.[51] Their communal, ancestral land is acknowledged as per their customs, traditions and mores. Indigenous people are entitled to use, own and control their land, territories and natural resources.[52] States and government shall recognize their traditional lands, resources and take steps to protect those lands as well as resources.[53] ADRIP provides comprehensive protection for indigenous peoples in North America, Mexico, Central and South America, and the Caribbean. After adoption of this instrument, OAS General Assembly sets out five-year plan (2017-21) to implement the rights and responsibilities of thirty-five OAS member countries including the United States.[54]

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *See* David L. Attanasio, *Extraordinary Reparations, Legitimacy, and the Inter-American Court*, 37 U. Pa. J. Int'l L. 813, 825 (2016).
[44] Article 13, 14, 15 of ILO Convention 169.
[45] Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Organization, June 27, 1989, 28 I.L.M. 1382.
[46] *Id.*
[47] *Id. see also* S.J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and U.N. Regimes A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Convention No. 169 and the U.N. Declaration,* 53 Stan. J. Int'l L. 169, 187–88 (2017).
[48] *Id* at 188.
[49] Article 21 of ACHR provides that 1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

[50] Article VI of ADRIP deals with collective rights. It provides that Indigenous peoples have collective rights that are indispensable for their existence, wellbeing, and integral development as peoples. In this regard, the states recognize and respect, the right of the indigenous peoples to their collective action; to their juridical, social, political, and economic systems or institutions; to their own cultures; to profess and practice their spiritual beliefs; to use their own tongues and languages; and to their lands, territories and resources. States shall promote with the full and effective participation of the indigenous peoples the harmonious coexistence of rights and systems of the different population, groups, and cultures.

[51] Article XXV of ADRIP deals with traditional forms of property and cultural survival. Right to land, territory, and resources. It provides that 1. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship to their lands, territories, and resources and to assume their responsibilities to preserve them for themselves and for future generations. 2. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 3. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 4. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. 5. Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories, and resources in accordance with the legal system of each State and the relevant international instruments. The states shall establish the special regimes appropriate for such recognition, and for their effective demarcation or titling.
[52] *Id.*
[53] *Id.*
[54] Forty-Seven Regular Session of OAS General assembly, OEA/Ser. P, June 19 to 21, 2017 AG/doc.5576/17, Cancun, Quintana Roo, Mexico, *see* http://indianlaw.org/sites/default/files/Plan%20of%20Action%20%28ENG%29%20FINAL%20VERSION%20ag07335e07.pdf

III. THE APPROACH OF INTER-AMERICAN COURT OF HUMAN RIGHTS (IACHR) TO ADDRESS PROPERTY RIGHTS

There is a growing jurisprudence in the approach of IACHR to adopt right-based criterion and victim centered approach such as victim's participation in the process and implementation of the decisions for reparations.[55] Indeed, the approach of IACHR is ground-breaking and hence, requires careful consideration. Regarding the non-monetary aspects, the courts have started to emphasize on the reality, preferences and needs of indigenous peoples for restoration.[56] Unlike European Court of Human Rights, the evolving jurisprudence of IAHRC with its binding jurisdiction is unparalleled. No other international forum advanced to declare and consider such extensive measures to address human rights violations. The diverse measures IAHRC directed as part of judgements for reparations includes legislative reform, apologies, medical psychological rehabilitation, and training programs for state officials.[57]

3.1 Mayagna (Sumo) Awas Tingni v. Nicaragua

The first legally binding decision of Inter-American Court that exemplifies the restitution of communal property rights of Nicaraguan indigenous community Awas Tingni was Mayagna (Sumo) Awas Tingni v. Nicaragua (2001).[58] On the basis of a compact between Ministry of Environment and Natural Resources and a Dominican-owned company Maderasy Derivados de Nicaragua, S.A. (MADENSA) in 1993, Nicaraguan government allowed that company to log on almost 43,000 hectares of land. Awas Tigni claimed nearly all those land as traditional communal land. Later, Nicaraguan government consented to suspend the concession with the influence of World Wildlife Fund (WWF). This international environmental organization suggested adequate environmental controls to the government and assisted the Community to negotiate with the government. A trilateral agreement was made in 1994 among MARENA, MADENSA and the Community for exploiting sustainable timber harvesting over that 43,000 hectares of land.[59] *Inter alia*, the agreement focused on the Community's economic benefit from timber exploitation and enhanced the process of demarcating and titling of the communal property.[60] In addition, the government agreed not to adopt any prejudicial action that goes against the Community's traditional land tenure.[61]

The Nicaraguan government broke its obligations not only by violating promises of demarcation and-titling of almost 43,000 hectares of land, but also engaged formulating in another agreement with Korean-owned company named Sol del Caribe, S. A. (SOLCARSA) to extract another Awas Tigni communal land of 63,000 hectares close to MADENSA management area.[62] In 1995, when the Community leaders came to know the government's preliminary approval of exploration license to the Korean company, the Community protested via its attorney on the ground that those exploration area is nothing but tribal land.[63]

The Community's written protest against Nicaraguan government's arbitrary allowance of concession and exploration was tuned into futile since SOCLARSA agents prepared an inventory of timber resources. Those natural resources were used by the Community people for their subsistence, agricultural, hunting and gathering purpose.[64] When the Community realized the intention of government to grant exploration license to Korean company, it filed an action of emergency relief in national court contending that their traditional land rights as recognized in Nicaraguan law is invaded.[65] But the Awas Tigni was not succeeded in domestic court. Thus, it proceeded to complain in OAS Inter-American Commission on Human Rights under ACHR where Nicaragua is a party. The Awas Tigni based its allegation on some provisions of ACHR such as right to property, right to cultural integrity and requested the Commission to stop government's unilateral action in order to establish their traditional land tenure.[66] It is mentionable that WWF-funded Iowa project helped identifying Awas Tigni's ancestral land and compiling data afterwards to support its claim.[67] The compiled historical, ethnographic, and geographic data revealed was the foundation of contentious legal claim for Awas Tigni to proceed at the highest level of adjudicatory system in IACHR.[68]

Although the community lacked official title to property, the court awarded Awas Tingni their ancestral land as per Article 21 of the American Convention that was granted to a logging company via state concessions to take timber out of their traditional land.[69] Recognition of communal land in accordance with customary law, traditions, values and mores

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[55] *See* Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 365-387 (2008).

[56] *See generally*, Thomas M. Antkowiak, *supra* note 8.

[57] *See* Thomas M. Antkowiak, *supra* note 55 at 365-387.

[58] *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

[59] *See* S. James Anaya and Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 Ariz. J. Int'l & Comp. L. 1, 3 (2002).

[60] *See* S. James Anaya & S. Todd Crider, *Indigenous Peoples, The Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua*, 18 HUM. RTS. Q. 345 (1996).

[61] *Id*.

[62] *Id* at 6.

[63] *Id* at 6-7.

[64] *Id*.

[65] The relevant provisions of the Political Constitution of Nicaragua and the Statute of Autonomy for the Atlantic Coast Regions of Nicaragua are discussed in Awas Tingni's Petition to the Inter-American Commission on Human Rights.

[66] *See* S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996).

[67] *Id*.

[68] *Id*.

[69] *See* Thomas M. Antkowiak, *supra* note 55 at 103,151,153.

was a ground-breaking decision of Inter-American Court.[70] The court also pronounced other violations such as community members' right to judicial protection.[71] It, in addition, imposed positive duty upon Nicaraguan state to take legislative steps for the purpose of creating a mechanism for delimitation, demarcation and titling of communal lands based on customary law.[72] Despite lack of full assessment of moral damages, the court generally directed $50,000 to community as services of collective interest as well as moral damages.[73]

Moral damages are an innovative development of this regional forum that takes into account the situations of a particular indigenous context. Declaration of a lump sum amount as compensation could not heal the historical wounds in total. Considering the physical needs of the indigenous community such as land restitution, secession of ongoing violations, structural development, housing, industrial and technological progress and mental healing such as rehabilitation center to remedy victim's trauma, other psychological care produces an atmosphere of restoring the health, dignity and habitat of the community. Here, the *Awas Tigni* Court recognized the difficult situation to demarcate the land area and to get official deed of title.[74] Since the court submitted brief for material damages twelve years later, it was held as unreasonable and hence, the petition was rejected.[75] Still, the *Awas Tingni* case was a crucial addition to the jurisprudence of communal property rights of indigenous people in Nicaragua since Nicaraguan government at that time circumvented the recognition of most of the ancestral, customary land rights of indigenous communities and considered those as state-lands.

3.2 Trilogy of cases against Paraguay

Three cases against Paraguay dealt with restitution of traditional lands of three indigenous communities such as Yakye Axa Community, Sawhoyamaxa Indigenous Community, and Xákmok Kásek Indigenous Community.[76] These communities lost their traditional lands against their will and those lands were transferred to third parties with active government approval. In such situations, the court ordered return of the ancestral land to those aggrieved communities. If such land is not possible to return, similar land of equal value can be replaced with the communities' sanction. Here possession of ancestral land is not a precondition to exercise their communal property rights. But the court found the poorly managed administrative procedure. Due to these administrative defects, delays occurred in every case and these communities faced hurdles to restore their ancestral lands from third parties.[77] Recovery proceedings took at least eleven years in the shortest case. Among other human rights violations, the court identified the infringements of property rights. State-imposed replacement of ancestral lands deprived them from practicing customary modes of subsistence and thus, were leading an abysmal life.[78] Thus, Paraguay was responsible for its inactivity, passivity, little diligence and lack of responsiveness. The Court has directly applied an embryonic test to assess state interferences upon traditional lands, considering the restriction's legality, necessity and proportionality with a "legitimate objective in a democratic society."

All three decisions were held that government must restore the ancestral land to all of three communities through creation of an effective mechanism for indigenous peoples' claims to ancestral land and the court ordered damages in equity payable to each community leader.[79] Although the court failed to assess lost earnings of the communities due to dispossession from their traditional habitat, it ordered pecuniary as well as non-pecuniary damages.[80] As regards moral damages, the court ordered creation of community development funds to be financed in agriculture, housing, education and health projects.[81]

3.3 Saramaka People v. Suriname

Saramaka People v. Suriname (2007) was another instance where the court considered the resource extraction from communal lands a contravention and required certain safeguards like prior consultation with Saramaka community, benefit-sharing, and impact assessments for Suriname to be complied with.[82] The title of communal land of Saramaka was not formally acknowledged by Suriname.[83] But the court has

[70] *See* S. James Anaya & Maia S. Campbell, *Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua*, in HUMAN RIGHTS ADVOCACY STORIES 117, 118 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009); Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 through October 2002*, 18 AM. U. INT. L. REV. 651, 685 (2003).

[71] Mayagna (Sumo) Awas Tingni Cmty., Inter-Am. Ct. H.R. (ser. C) No. 79, P 173.

[72] *Id.* at 164.

[73] *Id*. at 167.

[74] *Id.*

[75] *Id.* at 159.

[76] *See generally*, Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, InterAm. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

[77] *Id.*

[78] *See*, e.g., Yakye Axa Indigenous Cmty. Inter-Am. Ct. H.R. (ser. C) No. 125; Xákmok Kásek Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 214, P 337(3)-(4); Sawhoyamaxa Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 146, P 178.

[79] However, the sums vary significantly. Yakye Axa Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 125, P 195 (awarding $45,000 for the Yakye Axa community); Xákmok Kásek Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 214, P 317-18 (awarding $10,000 for the Xákmok Kásek); Sawhoyamaxa Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 146, P 218 (only awarding $5,000 to the Sawhoyamaxa).

[80] E.g., Xákmok Kásek Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 214, P 323.

[81] Yakye Axa Indigenous Cmty., Inter-Am. H.R. (ser. C) No. 125, P 205 ($950,000); Sawhoyamaxa Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 146, P 224 ($1,000,000); Xákmok Kásek Indigenous Cmty., Inter-Am. Ct. H.R. (ser. C) No. 214, P 323 ($700,000).

[82] *See generally*, Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

[83] *Id.* at 93.

condemned the logging and mining concessions of Suriname on Saramaka communal lands and hence found contravention of property rights under American Convention on Human Rights.[84] As per Article 21 and 29 (b) of the Convention, the court examined the traditional rights of Saramaka people and found that they are entitled to use and enjoy natural resources that exist in their own territory and that is necessary for their physical and cultural survival.[85] At the same time, the Court also acknowledged that Suriname may restrict this right by granting concessions for the exploration and extraction of natural resources but such restriction will not jeopardize the Saramaka's survival as tribal people.[86] The court measured extraction of valuable timber illegal without just compensation. The court regarded the state-activities as environmental destruction accompanied by despoiled subsistence resources and social and spiritual problems.[87]

The Saramaka Court has important dimensions regarding consultations and the sharing of benefits. 'Consultations must be culturally appropriate, taking into account traditional methods of decision making, and in order to enable internal discussion within communities, must take place at the early stages of an investment plan.'[88] The state must ensure that communities are aware of environmental and health risks. The court differentiated 'consultation' with consent in the sense that only consultation with tribal community is not enough in case of large-scale development project, but free, prior and informed consent of the Tribe is essential according to their customs and traditions. Regarding benefit-sharing, the right to compensation applies not only to total expropriation of property rights, but also to deprivation of regular use and enjoyment of such property as per article 21(2) of ACHR. Here, right to compensation converts into right to a reasonable share as a result of deprivation of use and enjoyment for their survival.[89]

Regarding reparations, the court measured $75,000 as material damages to compensate the *Saramaka* community for the appropriation of timber and associated property.[90] Referring the sufferings of the community, the court ordered $600,000 as moral damages to the community development fund to invest in education, housing, agricultural and health projects.[91] A three-member committee was formed to supervise and implement the project work and consultation with the community was made a prerequisite before any decisions and its implementation.[92] This case was indeed a glaring example where customary land rights of *Saramaka* community was recognized with full participation of the community in the decision-making process. Here, the court devised the enforcement of the judgement too and documented indigenous peoples' right to participation and consultation in the decision-making and decision-implementation stage.

3.4 Kichwa Indigenous People of Sarayaku v. Ecuador

Kichwa Indigenous People of Sarayaku v. Ecuador (2012) enforced the communal title to ancestral property of Sarayaku community and imposed reparations for damaging lands via oil exploration by a foreign company.[93] The State had granted communal property title to the Sarayaku community.[94] But the state reserved right to subsurface natural resources over communal land.[95] Later, Ecuador made a compact with a foreign company for the exploration of oil. The Sarayaku community protested the decision of exploration in their land since it damaged the land and disrupted the indigenous way of life.[96]

The court pronounced violation of collective property rights of the Sarayaku community as per Article 21 of the Convention.[97] It ordered $90,000 as reparations for environmental degradation and forest destruction of *Sarayaku* community.[98] But the court preferred allocating $1,250,000 to the community for their sufferings and destruction to cultural identity.[99] The court adopted pro-community approach to enforce the fund in accordance with community's own decision-making mechanisms and institutions.[100] The growing approach towards implementation of funds suggests the sole capacity of indigenous peoples to utilize development fund with their own mechanism. Here the court focused on effective participation of Sarayaku community and noted that Ecuadorian law recognized this right to consultation.[101] The judgement of *Sarayaku* court was premised upon the right to consultation as per American Convention as well as general principle of international law.[102]

Assessing the abovementioned case, the method and approach applied to determine land rights of indigenous peoples is pro-indigenous. The judgements considered indigenous culture, values and ancestral lands while assessing

[84] *Id*. at 214(1)-(3).
[85] *See* Marcos A. Orellana, Saramaka People v. Suriname. Judgment (Preliminary Objections, Merits, Reparations, and Costs). Series c, No. 172. at <http://www.corteidh.or.cr>. Inter-American Court of Human Rights, November 28, 2007, 102 Am. J. Int'l L. 841, 841 (2008).
[86] *Id.*
[87] *Id* at 153.
[88] See Marcos A. Orellana, *supra* note 85 at 485.
[89] *Id.*
[90] *See* Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, P 199 (Nov. 28, 2007).
[91] *Id* at 200-01.
[92] *Id* at 202.
[93] *See generally* Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).
[94] *Id* at 64.
[95] *Id* at 61-72.
[96] *Id* at 92-123.
[97] *Id* at 341.
[98] *Id* at 313, 316.
[99] *Id.* at 323.
[100] *Id.*
[101] *Id* at 168.
[102] *Id. see also* Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. Pa. J. Int'l L. 113, 155–57 (2013).

monetary damages. The IACHR exemplified non-monetary damages considering past injustices, damage to property, mental sufferings. The court is innovative not only for pronouncement of extra-ordinary reparations but also provides mechanism and ways how the money will be utilized for the welfare of the community people.

IV. THE ROLE OF COURTS IN SHAPING THE REPARATION RIGHT FOR NATIVE AMERICANS

The formation and experience of Indian Claims Commission (ICC) and Court of Federal Claims (CFC) help resolving many land claims cases. The most powerful person who pioneered the idea of formation of the Commission was Francis E Leupp who worked as commissioner of Indian Affairs from 1905 to 1908.[103] He wrote a book titled "The Indian and His Problem (1910)" in which he suggested the formation of a United States Court of Claims with the exclusive power to adjudicate Indian claims.[104] Leupp expected to dispose of all the claims within a three-year period. Leupp believed that such an arrangement would "clear the atmosphere and be fair to all sides." Even though no immediate steps were taken to implement Leupp's recommendation, the creation of a tribunal to resolve Indian land problem was a powerful idea. President Harry S. Truman, in 1946, spurred the idea into practice by approving and signing the Indian Claims Act of 1946.[105] It is important to note that the ICCA provided a limited window of time (5 year) for tribes to bring claims that arose before 1946. Thus, the ICCA may have provided some redress, but it also operated as a way to terminate and preclude claims based on historical injustice from being raised in the future.

Since the ICC was established to protect Indian land and water from non-Indian and state-encroachment, the land rights of the Native Americans had to be recognized in treaties, statutes, executive orders and other congressional legislations as well as moral claims.[106] In fact, ICC mechanism would eradicate the historic discrimination that Indians had faced with as they were barred from bringing takings and other claims against the United States.[107] The purpose of establishing ICC mechanism would resolve all outstanding Indian claims including fair and honorable dealings.[108]

Claims before the ICC and CFC are of various forms. They involve different defendants from the federal government for the most part, including state and local governments, corporations, individuals and even other tribes. Indian claims, tribal or individual, focus on not only land but also water, which has become a significant issue in litigation[109], as has violation of hunting and fishing rights laid down in treaties.[110] Mismanagement of timber resources has also been the basis of litigation.[111] Several cases relating to land have permitted the application of section 2415 of title 28 of US Code, by which the statute of limitations is set aside in favor of Indian litigants.[112]

A substantial portion of ICC litigation covered tribal claims for loss of aboriginal territory.[113] Not only legal claims were allowed before the ICC, any direct or indirect actions of the U.S. government pertaining to the loss of tribal land via 'fair and honorable dealings was adjudicable too.[114] Depending on moral claims such as dishonorable dealings by the U.S. government or requests to reform treaties due to fraud, mistake or duress tribes sought both monetary and equitable restitution.[115] Although Congress initially set a 10-year-period for settlement of tribal claims, due to the complexity of tribal factual issues involved and numerous claims filed, the ICC's jurisdiction was extended five times.[116]

In 1978, the Commission ended its work and jurisdiction switched to the CFC.[117] Despite the ICC's sluggish approach to deciding claims by September 1978, it successfully had decided 546 dockets and awarded $800 million as damages payable to the tribes. Congress, ultimately, approved the payment of $818,172,606.64 for implementing ICC awards.[118] The CFC was established in 1978 and replaced ICC. The CFC was another core development to focus on tribal land claims along with proper remedies and reparations. Although conventionally the CFC imposed monetary relief against the U.S., it has meaningful remedial power via Remand Act that amended Tucker Act in 1972 to provide certain equitable relief along with monetary damages.[119] The Court of Federal Claims, like all federal courts, is a court of limited jurisdiction.[120] Congress created the Court of Federal Claims to permit a special and limited class of cases to proceed against the United States.[121]

[103] Irredeemable America, The Indian's Estate and Land Claims, edited by Imre Sutton, Native American Studies, University of New Mexico, 5 (1985).
[104] *Id*.
[105] *Id*.
[106] *See* 25 U.S.C.S. § 70 (1983).
[107] Sandra C. Danforth, *Repaying the Historical Debt: The Indian Claims Commission*, 49 N.D. L. Rev. 359, 360 (1972).
[108] Raymond Cross, *Sovereign Bargains, Indian Takings and the Preservation of Indian Country in the 21st Century*, 38 Pub. Land & Resources L. Rev. 15, 116 (2017).
[109] *See* Hundley 1978.
[110] Imre Sutton, Irredeemable America, *supra* note 9, 1975.
[111] *See* Menominee vs US, 119 Ct. Cl.832 (1951).
[112] *See* Irredeemable America, *supra* note 9, pp. 9-10.
[113] *See generally*, United States v. Dann, 470 U.S. 39, 84 L. Ed. 2d 28, 105 S. Ct. 1058 (1989). *See also* State ex rel. Martinez v. Kerr-McGee Corp., 1995-NMCA-041, ¶ 2, 120 N.M. 118, 120, 898 P.2d 1256, 1258.
[114] *Id.*
[115] Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (originally codified at 25 U.S.C. § 70 and 28 U.S.C. § 1505). [hereinafter ICCA]. *See* ICCA, *supra* note 14, which incorporated some of these grounds. Tribal assertion of such claims did not end with the ICC's termination. *See* Linda S. Parker, Native American Estate: The struggle Over Indian and Hawaiian Lands 132-3 (1989).
[116] *See* 25 U.S.C. § 70 (1978).
[117] *See* Linda S. Parker, *supra* note 21, *133 (1989).*
[118] *Id.*
[119] § 3657 Statutory Exceptions to Sovereign Immunity—Actions Under the Tucker Act, 14 Fed. Prac. & Proc. Juris. § 3657 (4th ed.).
[120] 6B Fed. Proc. Forms § 18:30.
[121] *Id.*

The CFC has power to award monetary damages and other reliefs incidental or collateral to monetary relief. The Tucker Act placed exclusive jurisdiction over tribal Fifth Amendment takings clause claims in the CFC.[122] The main legal barrier of the Court to implement the legal claims was that only those property rights are enforceable in CFC that were recognized by treaty or statute.[123] Unrecognized trust property takings are actionable in CFC as a breach of trust claim but prejudgment interest[124] is not allowed for those claims.[125] Again, only those claims over mismanagement of trust funds that are founded upon treaties or statutes are acceptable before the CFC.[126] In addition to particular statutes dealing with claims for monetary damages, specific statutes subject to adjudication before the CFC must provide for a "money-mandating claim".[127] That means specific statutes must include provisions that establish clear standards for paying money to recipients, specific amounts that must be paid, and payment subject to satisfaction of certain conditions.[128]

The preclusive effect on ICC decisions should not be applied to retained rights such as off-reservation fishing rights in subsequent litigation.[129] Off-reservation fishing rights do not always depend upon aboriginal land ownership.[130] ICC and CFC were set up to provide only one type of redress like compensation. They have no authority to award restoration or restitution. Maximum tribes accepted the decisions of commission and court. Only a few went to Congress for restoration and fortunately some of them were successful in establishing its claim.[131]

4.1 Background of Federal Indian Policy relating to Reparation Right

The political and economic history of Native Americans transcends the long deep-rooted injustice associated with lands. The United States government did not recognize the aboriginal title of Native Americans.[132] Although the aboriginal title is recognized, no damages are payable for this land. Historically, three recognized methods were documented for establishing Native American title, 1) formal recognition of original Indian title, 2) exchange of lands, and 3) purchase of lands.[133] Whatever, the methods the US government followed to establish title to land, the approach applied seized vast portion of land from Native people's ownership and possession without any reparation claim.[134] The consequence of racism, power competition and the natural dynamics of power was the Trail of Tears that not only deprived four thousand Native Indians from their life but also it grabbed for gold prospections seven million acres of Cherokee land by 1838 Treaty in Tennessee, Georgia and North Carolina.[135] Instead of any assurance for restoration of land or other suitable methods of reparations, President Jackson just promised that relocation will help savaged Native Indians to recover the situation with the assistance of the United States government and its proper counselling.[136] By passing 1783 Act, North Carolina dispossessed more than 100,000 people without any damages with a declaration that Native Indians' lands were forfeited.[137] On the contrary, the Cherokees had to pay $4.5 million from their own purse as removal costs.[138] Moreover, sidestepping the 371 formal treaties, the countless informal unratified treaties took vast area of land from Indians.[139]

The United States government created the reservation for Indians to live. While moving to reservations, Northwestern tribes lost millions of acres of land against which tribes received no reparations. Californian tribes, on the contrary, identified the theft of their lands by gold-hungry prospectors and imposed $924,259 in payment to the US federal government from 1849 to 1860.[140] In addition to vast loss of lands for which the Native Indians e.g. Californian Indians received no reparations, the government tortured them via slavery and anti-social activities.[141] Some forced and depriving actions of government such as treaty annuities being stolen persuaded Indians (the Sioux tribe) to declare war on the settlers (non-Indians) who had removed them from their lands as well as killed several hundreds in America's most violent uprisings.[142] The government justified forced transfer to reservation on the ground of 'so-called protection' but this led the Indians to immense loss of land and population

[122] *See* Cohen's Handbook of Federal Indian Law, § 5.06 [4][c] at 442 (Nell Jessup Newton, et al. eds. 2012 ed.).
[123] *Id*.
[124] When a party wins in a case, he is entitled to monetary damages. Prejudgment interest is extra money in addition to monetary damages that could be earned or due over the period of time. These may be medical bills or compensation for lost wages.
[125] Cohen's Handbook of Federal Indian Law, *supra* note 28, at 443 (Nell Jessup Newton, et al. eds. 2012 ed.).
[126] *Id*.
[127] *Id*.
[128] *See* Perri v United States, 340 F 3d 1337, 1342-43 (Fed. Cir. 2003).
[129] Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation over Off-Reservation Treaty Fishing Rights*, 31 U. Haw. L. Rev. 475, 476 (2009).
[130] *Id*.
[131] *Id*.
[132] Cohen's Handbook of Federal Indian Law, § 15.04[3][a] (Nell Jessup Newton, et al. eds. 2012 ed.) at 1004-05.
[133] *Id*.
[134] *Id* at 1005-08.
[135] *See* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 Okla. City U. L. Rev. 379, 385 (1998).
[136] *Id*.
[137] *See* Silvester J. Brito, *American Indian Political Participation: From Melting Pot to Cultural Pluralism*, Am. Indian Culture & Res. J. 53 (1984).
[138] *Id*.
[139] Professor Vine Delora has identified numerous unratified treaties that only removed land from Indians. *See* Rupert Costo & Jeannette Henry, *Indian Treaties: Two Centuries of Dishonor* at x-xi (1977).
[140] Fergus M. Bordewich, *Killing the White Man's Indian* 48 (1996).
[141] *Id*.
[142] *See* Charles Alexander Eastman, *Their Wonderous Works and Ways, in Native American Testimony* 21 (Peter Nabokov ed., 1991).

numbering in the 1500 millions to less than 300,000 in 1880.[143]

The main purpose of reparations is to heal the historic injustices and restore the capacity as well as economic well-being of the indigenous community. The right to compensation for federally recognized tribes was acknowledged when the federal government acquired land by eminent domain.[144] Since federal government holds tribal land as 'trust property' and the ultimate title of ownership belongs to the US federal government, early Marshall court cases demonstrated that no one can take tribe's title without its voluntary consent.[145] Also, the court continuously emphasized that the capacity to extinguish tribal title depends upon federal government.[146] Thus, the exclusive power to extinguish Indian title to land rests with the United States, more specifically with the Congress (express and unambiguous) and this principle has not changed even today.[147]

The common notion in western legal and constitutional theory supports that government is authorized to confiscate or acquire land from its citizens for public purposes with the payment of appropriate reparations to the aggrieved party. Assertion of government to uncompensated acquisition as valid does not cure the historic wrongs which could be validated only via restitution or monetary damages.[148] Several eighteenth and early nineteenth centuries old treaties demonstrated the tricky approach of US government such as fraud, threat of force and weak bargaining capacity of Native Americans that left no choice but to cede more lands.[149] "The American Army dogged tribes across the plains, through the forests of Idaho and Oregon, in and out of desert canyons, and through the swamps of Florida until tribe after tribe realized they would have to sign a terrible treaty or face extinction."[150] Government's fraudulent land policy obscured the line of consent and coercion in federal Indian policy.[151]

The US federal government later adopted federal statutes as the instruments of dispossession from tribal land. For one decade: 1865-1875, federal government confiscated one-fourth of forty-eight states as per opinion of Russel Barsh.[152] At that time, there was no US tradition to remedy the confiscated tribal land. Thus, with no compensation or token compensation, near one billion acres were acquired abruptly.[153] The curse of allotment era to open tribal land for non-Indians led Native Americans to deprive of tribal ownership of another ninety million acres of land unilaterally privatized and Indian land was enormously shrank to two-thirds.[154]

The US government always justified its confiscation on the ground of cultural and racial superiority, but under its dominance, it had greed for land. And the US Supreme Court reinforced these takings as legal action of government and ultimately, people agree to take the collaboration of legislature and judiciary as impartial. The blanket authority to takings without any consideration of reparations premised upon the effective words of Marshall Trilogy, the plenary power cases of the eighteenth and nineteenth century that designed American Indian Law.[155] Some later cases such as: Tee-Hit-Ton Indians v. United States[156] in 1955, which would legitimize the confiscation of Alaska in 1971, and United States v. Sioux Nation of Indians[157] in 1980 legitimized the rules of formal inequality and avoid communities participation in decision-making altogether relating to tribal land.

4.2 Legal Claims attended by Claims Courts and Appellate Courts

Native Americans land cession was a pivotal source of loss that the Indian claimants sought to remedy before ICC and CFC. The Indians claimed that the U.S. acquired valuable land with unconscionably low or nominal prices by exercising unequal bargaining power. A typical case before the Commission and Court would seek additional compensation over the amount initially settled in the taking or purchase process. Since around eighty percent of those transactions and claims were decided as per treaty-rights,[158] award of the ICC and CFC stereotypically comprised additional damages in the form of money, goods, services or a combination of the three. Normally, ICC and CFC would award the difference between a grossly inadequate consideration and the fair market value of the land at the time of the treaty less the offsets.[159]

[143] *See* Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival, in The State of Native America* 23, 26, 36 (M. Annette Jaimes ed., 1992).
[144] *See* Cohen's Handbook of Federal Indian Law, § 15.04[3][a], *supra* note 103 at 999.
[145] *Id* at 1051.
[146] *See* Oneida Indian Nation vs County of Oneida, 414 U.S. 661 (1974).
[147] See Cohen's Book of Federal Indian Law, *supra* note 103, § 15.04[3][a] at 1052-53.
[148] *See* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 Ga. L. Rev. 453 (1994).
[149] *See* Francis Paul Prucha, *American Indian Policy in the Formative Years* 142-44 (1962).
[150] *See* Matthew Atkinson, *supra* note 106 at 379, 385.
[151] Translations from English language was a trouble since translators could not convey well feudal concepts of fee title to those natives who knew the common ownership of land. Dishonest translations distorted the true nature of the transactions. Consequently, tribes often assumed they were granting usage rights in treaties ceding land in perpetuity. Since the translations were oral, for the most part (the Cherokees and some of the so-called Five Civilized Tribes had developed a written language), disputes were judged against the plain meaning of the document. *See generally* Prucha, *supra* note 119.
[152] Russel Lawrence Barsh, *supra* note 122 at 7.
[153] Approximately 325,000 acres in the Great Basin were taken without compensation. *See* Barsh, *supra* note 122 at 7. The entire State of California was taken by statute after the Senate failed to ratify treaties entered into by all the California Indian tribes who would have retained substantial land. *See* Indians of California v. United States, 102 Ct. Cl. 837 (1944).
[154] *See* S. Lyman Tyler, *A History of Indian Policy* 124 (1973).
[155] *See* Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[156] 348 U.S. 272 (1955).
[157] 448 U.S. 371 (1980).
[158] *See* Irredeemable America, *supra* note 1, p. 49.
[159] Indian Claims Commission, 1968, referred in Irredeemable America, *supra* note 1, p.50.

Exclusive occupancy over aboriginal land that came for consideration of the Commission and the court constituted a determining factor for the settlement of land disputes.[160] Aboriginal possession or title produces exclusive occupancy that may award Native American.[161] The courts had to deal, in numerous cases, with exclusive occupancy of the tribes which ended up without any obligation to compensate.[162] The most difficult factual problem in front of the Commission was to define the territory the Indians were occupying exclusively.[163] The Commission while determining such territory followed the Supreme Court ruling in *U.S. vs Santa Fe Pacific R R Co*.[164] The Supreme Court in this case held that exclusive occupancy had to be demonstrated in a definable territory to establish aboriginal possession.[165] Proving compensable interests demanded exclusive tribal use and occupancy over tribal land from time immemorial.[166] Moreover, the term "exclusivity" was made more complex by the second qualifying term "time immemorial." There was no hard and fast rule to establish the requirement of "time immemorial."[167] Each case needed a vast amount of data-materials to support and proof the relevant requirements.[168] Again, exclusive occupation was denied on the ground that more than one tribe occupied and used the same area and recovery was generally disallowed in such cases.[169] Here are a few examples of pioneering cases before the ICC and the CFC which somewhat overcame the problem:

a) State ex rel. Martinez v. Kerr-McGee Corp (1995).

The case was a glaring example of recognition of aboriginal title and assertion of damages for the loss of aboriginal lands and water rights of the Laguna and Acoma Pueblos. Prior ICC judgments did not preclude the Laguna and Acoma Pueblos from asserting water rights against the State of New Mexico and private parties.

The New Mexico Court of Appeals in *State ex rel. Martinez*[170] noted the Pueblos' monetary compensation claim in the ICC for permanent loss of aboriginal lands and irrigation waters appurtenant to retained lands.[171] Though the ICC found the Pueblos losing title to certain aboriginal lands and water appurtenant to those lands,[172] it did not find that the irrigation waters appurtenant to the Pueblo's retained lands had been diminished.[173] Tribes gradually lost their aboriginal lands and appurtenant water rights due to enlargement of Bluewater Dam on the Rio San Jose with the tacit approval of the United States government.[174] They monetary compensation due to permanent loss of their aboriginal land and water rights in 1951.[175] In both Pueblo cases in 1967, the ICC pronounced interlocutory judgments recognizing the loss of aboriginal title of the Pueblos due to the government's action or inaction and hence declared that the Pueblos were entitled to monetary damages.[176] The Pueblos proved that the U.S. government had extinguished their aboriginal title and appurtenant water rights in lost lands. Although forty-four experts were involved to address a vast-majority of issues, the Pueblo failed to prove that the enlargement of Bluewater Dam had diminished irrigation water on their retained lands.[177] The court affirmed the summary judgment and held that the Indian claimants did not have water rights by virtue of the *Winters* water doctrine.[178] The Pueblos and United States then settled the case.[179]

The case of Martinez pointed out two common law preclusion doctrines - claim preclusion and issue preclusion which restrict the re-litigation of claims under certain circumstances. Common law preclusion principles are often applied in cases that are filed by or on behalf of tribes. Tribes usually claim for recognition or enforcement of treaty rights when the exclusion doctrines were raised defensively against them.[180] Sometimes litigants opposing tribal claims also argued that a special doctrine of statutory preclusion should be applied in the context of the ICCA to limit subsequent claims made by tribes.[181] The party seeking to preclude litigation has the significant burden of proving that the issues are identical because "similarity between the issues is not sufficient," and the burden of showing "with clarity and certainty" that the issue was actually and necessarily determined.[182] These principles have been favorably applied to future land and water rights claims by tribes. The court in *Kerr-McGee* determined that issue preclusion did not bar subsequent

[160] Indians - United States Must Compensate for Appropriation of Lands Occupied by Tribes Under Original Indian Title, 60 Harv. L. Rev. 465, 465–66 (1947).
[161] *Id*. Coos Bay Indian Tribe v. United States, 87 Ct. Cl. 143 (1938).
[162] 41 A.L.R. Fed. 425 (Originally published in 1979).
[163] *Id*.
[164] *See* United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).
[165] 41 ALR.
[166] Harvey D. Rosenthal, Indian Claims and the American Conscience, Irredeemable America, *supra* note 1, p. 52.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *See* State ex rel. Martinez v. Kerr-McGee Corp., 1995-NMCA-041, ¶¶ 4-5, 120 N.M. 118, 120, 898 P.2d 1256, 1256.
[171] *Id*. at 1258.
[172] *Id*.
[173] *Id.*
[174] *See* Martinez, *supra* note 39, ¶¶ 4-5, 120 N.M. 118, 120, 898 P.2d 1256, 1258.
[175] *Id.*
[176] *See* State ex rel. Martinez v. Kerr-McGee Corp., 1995-NMCA-041, ¶ 5, 120 N.M. 118, 120, 898 P.2d 1256, 1258.
[177] *See* Michelle Smith & Janet C. Neuman, *supra* note 13, 31 U. Haw. L. Rev. 475, 496 (2009).
[178] *See* State ex rel. Martinez v. Kerr-McGee Corp., *supra* note 39, 898 P.2d 1256, 1257. Winters doctrine recognized that when federal government reserved land for an Indian reservation, it implicitly reserved sufficient water rights for reservation needs.
[179] Martinez, *supra* note 39, at 1258.
[180] *See* Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Commission Decisions in Their Place:*
Assessing the Preclusive Effect of ICC Decisions in Litigation over Off-Reservation Treaty Fishing Rights, 31 U.
Haw. L. Rev. 475, 476 (2009).
[181] *See* Arizona v. California (Arizona III), 530 U.S. 392, 416 (2000).
[182] *See* § 7:23. Entry of decree—Preclusion of federal reserved and other Indian water rights, L. of Water Rights and Resources § 7:23.

claims, including those for lost water, filed by the Pueblos because the ICC did not actually and necessarily rule on the issue of ownership of the lands in question. The ICC simply established the amount of land that the Pueblos had lost outside their reservation. But the case is important because it involved irrigation practices, hydrographic surveys, reservoir storage, hydrology, irrigation water requirements, water use, history, and anthropology.[183] The United States compensated the amount awarded.

b) Alcea Band of Tillamooks v. United States (1950).

The pioneers of Indian rights consider this case as an amazing success of the Supreme Court in granting reparations to some tribes of Oregon Indians regarding their unrecognized title lands.[184] The case was a first of its kind arising under a statute permitting the unrecognized Indian title claims to be sued in the court. Prior to this decision, awards were only provided to recognized title. Since its establishment in 1946, the ICC started applying the "high standards of fair dealings"[185] test. Chief Justice Vinson judiciously clarified that this jurisdictional act meant a congressional consent to the removal of the bar of sovereign immunity. Since no new cause of action had been created, the Indians presumably had to base recovery on whatever legal and equitable rights they might have under the Indian title.[186] Thus, the case removed two great obstacles from the way of Indian settlement claims. First, in order to receive reparation for land-loss, the tribes no longer need to show a title that was made legitimate via sovereign recognition.[187] Second, the ICC was set up to remove the special jurisdictional act to allow access to the court of claims.[188]

The Indian tribes lived on over two million acres of land in Oregon which was taken by the U.S. in 1855 as a result of a treaty between Indian tribes and Superintendent of Indian affairs for the Oregon territory.[189] The treaty provided for cession of their tribal lands in return for monetary value and the creation of a reservation. The area comprised more than half of the state's coastal frontage.[190] The court determined that four tribes out of eleven were entitled to the amount of compensation to which they held original Indian title in 1855.[191] The court concluded that the lands taken by the U.S. had an average value of at least $1.20 per acre in 1855.[192] The court took into consideration several factors in order to determine fair market value such as the proven demand for the land, the prices at which it was disposed of by the government and by the settlers themselves, and the mineral, agricultural and timber values.[193] The factors also included the reasonable costs of making all necessary surveys and supervising the disposition of such lands.[194] The United States was entitled to have offset against the total judgment rendered for just compensation the amounts it spent on behalf of the Indian tribes.[195] The court also added five percent interest for the period 1855 to 1934 and four percent thereafter to the just compensation.[196] Five percent was the amount the funds would have earned if invested by the tribes in the Treasury.[197] The court determined the value of the land from the record as a whole and determined the amount by which the just compensation was to be increased for reasonable interest.[198]

The majority opinion in *Tillamooks* did not explicitly depend its award of compensation on the U.S. Constitution. Rather its reliance on the treaty title suggested that Indian title land was constitutionally protected.[199] Although the theory and standard of recovery was unclear, *Tillamooks* did establish that Indian title could support recovery and reparation.[200]

c) Miami Tribe of Okla. v. United States (1960)

This case exemplifies the "price-value disparity unconscionability" notion. The American contract law doctrine of unconscionability evolved from the common-law courts of equity which empowers courts to invalidate oppressive or unfair agreements. A two-prong test is acknowledged in Anglo-American system to support the doctrine of unconscionability.[201] The first prong relates to unjust enrichment and excessive speculation. If a party utilizes the contract to gain more than he deserves, the contract meets the first prong.[202] Undeserved gain occurs in many different circumstances: through simple excessive demand to speculation on uncertain future events.[203] That is, if a party is in a position in which she can demand and receive more value than she gives up, the first prong is met.[204] The second prong of the test ponders over oppressive relationship. In common law, courts consider several factors including "(1) unequal bargaining power; (2) limited time in which to read and understand the contract; (3) use of fine print; (4) absence of meaningful choice; (5) excessively one-sided terms; (6) a

[183] *See* 2015 WL 9194950, at *6.

[184] Daniel G. Kelly, Jr., *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 Colum. L. Rev. 655, 667–68 (1975).
[185] Irredeemable America, *supra* note 1, p.40.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *See* Indians - United States Must Compensate for Appropriation of Lands Occupied by Tribes Under Original Indian Title, 60 Harv. L. Rev. 465 (1947).
[190] *See* Alcea Bank of Tillamooks v. United States, 103 Ct. Cl. 494, 59 F. Supp. 934 (1945).
[191] *Id.*
[192] *Id.*
[193] See Alcea Bank of Tillamooks, *supra* note 93, 934, 968 (1945).
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] Daniel G. Kelly, Jr., *supra* note 53, 75 Colum. L. Rev. 655, 669 (1975).
[200] *Id.*
[201] Asifa Quraishi, *From A Gasp to A Gamble: A Proposed Test for Unconscionability*, 25 U.C. Davis L. Rev. 187, 216–17 (1991).
[202] *Id.* See Frank P. Darr, *Unconscionability and Price Fairness*, 30 Hous. L. Rev. 1819, 1820 (1994); Jeffrey Harrison, *Class, Personality, Contract, and Unconscionability*, 35 Wm. & Mary L. Rev. 445, 452 (1994).
[203] *Id.*
[204] *Id.*

monopolistic market; (7) an adhesion-type contract; (8) the level of education and experience in the marketplace."[205]

In the *Miami Tribe of Oklahoma*[206] case, an American Indian tribe protested the sale of its land to a federal agent for less than one half of its market value.[207] Despite the fact that drawing a line in such cases is difficult to handle for the court,[208] the court found the contract unconscionable due to inadequacy of price.[209] In fact, there is no golden rule to say what is conscionable and what is not.[210] . Likewise, a court would probably also find this contract unconscionable under the proposed test because it grants the buyer an unjust enrichment in the form of excessive profit. [211] The excessiveness of the profit, however, depends upon marketplace, custom and norms.[212] Given the facts of the case and the court's attitude toward the low price, it appears that the price term did exceed market norms. Because this type of unjust enrichment does not involve unfair surprise, the court may find the contract unconscionable if it meets the second prong,[213] but the urgency is not so great. The Miami Tribe also incorporates the second prong, oppression. The factors indicating oppression include: "(1) the unequal bargaining power between the government and a sole Indian tribe;[214] (2) Miami Tribe's potential lack of understanding of the terms of the contract;[215] (3) their possible lack of meaningful choice;[216] and (4) the general one-sidedness of the contract."[217]

The Court of Claims reversed the decision of the ICC that denied the Tribe's complaint for seeking additional compensation under §§ 70a (3), (5) of the ICCA (25 U.S.C.S. §§ 70-70v) for land ceded to the United States by the Treaty of June 5, 1854.[218] The ICC rejected the claim on the ground that the amount paid was unconscionable.[219] Reversing the decision of ICC, the court found that the Tribe only received 38 percent of the land's fair market value.[220] The court also observed that the ICC's judgment was not based on a wholesale theory. Also, there was no substantial evidence of any agreement to provide land in Kansas in exchange for the Indiana land ceded. The court reviewed the commutation of annuities and decided that the consideration paid by the government was inadequate. The reason behind it was that the annuity was a permanent annuity that could not terminated by the government's unilateral declaration that the tribe no longer existed. The court held that the annuity was to be valued as a 20-year annuity payable to various individual tribesmen. The court reversed the decision of the Commission and remanded the case for entry of an order that the government pay additional compensation to the tribes for land previously ceded. The court pronounced the judgment in favor of the tribes for the value of the land, the balance due under a commuted permanent annuity, and interest.

Price value disparity played a central role in land claims before the ICC and the CFC. To settle the difference, fair market value was the test the ICC and the CFC used to resolve land claims.[221] Price-value disparity cases also illustrate the need for both prongs of the test. The first prong of the test related to unjust enrichment i.e. the difference between the price paid and the value obtained. The second prong of the test dealt with the oppression existed in the transaction of land claims between and the U.S. government and tribes.[222]

This common law doctrine of unconscionability, a growing concept, has been applied by the ICC and the CFC in the land claims cases. Also, these interests are properly considered even if the tribe's title in the land is unrecognized, assuming that there is a right of recovery for unrecognized title under the appropriate jurisdictional act.

Legal claims of tribes developed a set of rules and principles to resolve land disputes before ICC, CFC and other courts. Almost all land claims cases involve investigation about the nature of aboriginal title, recognized title and its correlation with the extent of land rights and possession or occupancy of the Indian claimants over their Indian lands. Primarily, common law principles of preclusion i.e. claim preclusion and issue preclusion facilitated the settlement of tribal land claims. The courts considered favorably Aboriginal title and recognized title and provided damages to the aggrieved tribes based upon fair market value for dispossession or land cession. Again, determining fair market value does not follow a flat guideline. The standard of factor determining fair market value is that the price should not be grossly inconsiderable. The court follows the objective standard while determining fair market value. Again, the government is entitled to set off the costs it spent for the tribes.

The Commission, in general, acknowledged only the recognized title of the Indians that could be successful to prove a compensable interest. The problematic aspect of these land claims was that, out of 270 petitions, most of the Indian title were accompanied by no ratified treaty of recognition.[223] Recognized title was the consequence of congressional action

[205] *Id*. *See also*, Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 La. L. Rev. 123, 141 (2005).
[206] *See* Miami Tribe of Okla. v. United States, 150 Ct. Cl. 725, 729, 281 F.2d 202, 204 (1960), cert. denied, 366 U.S. 924 (1961).
[207] *Id* at 208. The payment price was $121,947, but the value of the land was $316,698. *Id.*
[208] *Id*.
[209] Miami Tribe of Oklahoma, *supra* note 75, 281 F.2d at 208-09.
[210] *Id*.
[211] *Id*.
[212] Miami Tribe of Oklahoma, *supra* note 75, 281 F.2d at 208-09.
[213] *See generally*, Asifa Quraishi, *supra* note 70, 223–24 (1991).
[214] *See* Miami tribe of Oklahoma, *supra* note 75. *Id.* at 211-12.
[215] *Id*.
[216] *Id*. *see also*, Asifa Quraishi, *supra* note 70, 187, 224 (1991).
[217] *Id*.
[218] *See* Miami Tribe of Okla., *supra* note 75, 202, 204 (1960).
[219] Asifa Quraishi, *supra* note 70, 25 U.C. Davis L. Rev. 187, 228 (1991).
[220] *Id*.
[221] *See*, e.g., Miami Tribe of Oklahoma, *supra* note 75, U.S. 924 (1961). *See also*, Asifa Quraishi, *supra* note 70, 25 U.C. Davis L. Rev. 187, 228 (1991)
[222] *Id.*
[223] *See* Irredeemable America, *supra* note 1, p.52.

and a question of law.[224] The proof of recognized title was indeed difficult since it required demonstration of continuous exclusive possession. It specifically granted permanent legal rights of occupancy to a tribe over a defined territory.

4.3 Moral Claims before ICC, CFC and Other Appellate Courts

In some instances, the federal government is held liable for tribal land takings without remedy or inadequate compensation before ICC and CFC under "fair and honorable dealings" clause (25 U.S.C.A. § 70a (5)). The yardstick of fair and honorable dealings required for the federal government to manage Indian affairs is high.[225] Fair and honorable dealings of federal government follows no specific parameter or guideline. Those matters not covered in any rule of law or equity are recognized by courts within the ambit of "fair and honorable dealings." The ICC in *Seminole Nation of Oklahoma v United States (1974)* agreed that fair and honorable dealings as envisaged in ICCA is not "all inclusive" for every kind of loss or denial of rights whether physical, psychological, social, economic, and cultural harm suffered by the Indian people due to the actions of the United States.[226] Although the acceptance of moral claims of tribes is less and difficult to prove sufficient facts and evidence, ICC and CFC recognized cases based upon fair and honorable dealings.

a) Sac & Fox Tribe of Indians v United States

Purchasing Indian land from the tribe and later selling the property outside with a profit margin does not entail federal government to infringe its fair and honorable dealings clause.[227] In *Sac & Fox Tribe of Indians v United States* (1967), the tribe alleged that they were entitled to the profit earned by the federal government under fair and honorable dealings as well as constructive trust.[228] The court denied the claim on the ground that the general kind of relationship between the parties did not create a legal guardianship or consequential constructive trust.[229] The court concluded that when the federal government acquired the tribal land, it determined the fair market value and paid accordingly.[230] So, the measure of recovery was the fair market value of their Indian title lands at the date of acquisition by the United States. The court further stated that the measure of recovery was the date of acquisition by the United States. Therefore, denying profits acquired by the federal government via selling does not liable government under fair and honorable dealings and hence, the tribes were not entitled to the profits made by the U.S.[231]

b) United States v Emigrant New York Indians

The decision of ICC in *United States v Emigrant New York Indians (1966)* was another example where the Commission found demonstration of ample evidence to infringe the standards of fair and honorable dealings clause by the government.[232] The New York Indians were deprived of their title to certain western lands. The 1822 treaty between a number of New York tribes including the Six Nations of the Iroquois Confederacy and certain Indians in Wisconsin deals with the purchase of a large tract of land.[233] That piece of land provided undivided half-way interest and right to use the land in common with the selling Indians.[234] Depending on the 1822 treaty-rights, many of the New York Indians sold their lands and moved to Wisconsin.[235] But the government said, in the 1822 treaty, New York Indians were not a party under which they originally acquired 569,120 acres, not 4,000,000 acres.[236] The ICC revealed that those Indians were compelled to accept the terms of treaty, failing which they were threatened with expulsion from their lands.[237] Finding the presence of duress while making the 1822 treaty[238], the ICC held that the U.S. government was liable for its actions in dealing with New York Indians and broke promises and induced them to sell their land and moved.[239] Thus, the ICC declared the violation of the fair and honorable dealings clause.

c) *Gila River Pima-Maricopa Indian Community v. United States*

The ICC decided Gila River Pima-Maricopa Indian Community v. United States on fair and honorable dealings in 1970 that is considered the first case on the topic.[240] The said Gila River Pima-Maricopa Indians were the most impoverished tribe amongst Indian community during the 1950s. Since the community comprises wealthy and peaceful farmers at the time of contact, they wanted to accommodate the Euro-Americans.[241] The community avoided war. They could not even make treaty to ensure their better life. Only, they secured assurances when they became acculturated. They filed several cases before ICC and sought damages since they

[224] See 41 A.L.R. Fed. 425 (Originally published in 1979).
[225] *See* 45 A.L.R. Fed. 680 (Originally published in 1979).
[226] *See* Seminole Nation of Oklahoma v United States (1974) 204 Ct Cl 655, 498 F2d 1368, cert den 420 US 907, 42 L Ed 2d 837, 95 S Ct 825, reh den 420 US 984, 43 L Ed 2d 666, 95 S Ct 1415.
[227] *See* Sac & Fox Tribe of Indians v United States (1967) 179 Ct Cl 8, 383 F2d 991, cert den 389 US 900, 19 L Ed 2d 217, 88 S Ct 220.
[228] *Id*.
[229] Sac & Fox Tribe of Indians, *supra* note 94, 991, 993 (1967).
[230] *Id*
[231] *Id* at 1002.
[232] *See* United States v Emigrant New York Indians (1966) 177 Ct Cl 263.
[233] See 45 A.L.R. Fed. 680 (Originally published in 1979).
[234] *Id*. *See also*, Karim M. Tiro, *Claims Arising: The Oneida Nation of Wisconsin and the Indian Claims Commission*, 1951-1982, 32 Am. Indian L. Rev. 509, 512 (2008).
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] See 45 A.L.R. Fed. 680 (Originally published in 1979).
[239] *Id.*
[240] *See* Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194, 1195 (Ct. Cl.), cert. denied, 400 U.S. 819 (1970).
[241] *See* Nell Jessup Newton, *supra* note 12, 41 Am. U. L. Rev. 753, 777 (1992).

lost much Indian lands as well as water rights.[242] The tribe contended that the Government had deprived them from their land and its associated benefits.[243] They argued that the Government assured them to provide educational and health services but ultimately what the government served was in fact insufficient.[244] ICC construed the fair and honorable dealings clause narrowly and denied the tribe's claim accordingly.[245] Later, the CFC upheld the Commission's grant of summary judgment.[246] The CFC asserted that the absence of treaty or statute warranted that the tribe is not entitled to compensation.[247] Judge Nicholas concurred that the structure of the Commission could not accommodate each and every dispute among the parties during the existence of 170 years of their relationship.[248] The ICC rejected the claim for damages based upon the contention that fairness and honor do not include special advantage sought by the Indians. The court said that there was no legal obligation to include a provision of subjugation or improvements on the land at the end of its use.[249] The fair and honorable dealings clause requires that adequate compensation payable to the Indians demands the deliberate failure of government to subjugate and prepare for irrigation a parcel of reservation land.[250]

4.5 Black Hills of Standing Rock Sioux Tribe (South Dakota): A Long-Standing Grievance

Following the limitations of ICC and CFC, this section explains the approach of court to handle the case of Standing Rock Sioux Tribe's control over Black Hills. The Sioux Indians of Minnesota faced a tremendous loss of lives and land from its early history since 1862.[251] The land-cession treaties of 1851 that ceded twenty-four million acres of land was considered as 'monstered conspiracy'.[252] This treaty was made against the promise to pay monetary benefits and assurance of food and other supplies to sustain the community. But the promise was rarely fulfilled which made their life vulnerable and precarious indeed and led to ethnic cleansing.[253] This traumatic horrific legacy of 1863 Acts of Congress and its subsequent two marches demands reparations for the Dakota people since they still are traumatized that echoes restorative justice.[254] Red Cloud, an activist against the selling of the sacred Black Hills of the Sioux, signed away the land only after years of starvation and murder at the hands of soldiers (even Americans called the deal a "sign or starve" treaty). He spent the rest of his life protesting a decision he had made only to spare the life of his people for a few more years.[255]

The Sioux Nation v. United States (1980) decision was considered an upheaval and 'judicial colonization' in the history of Native Americans.[256] In this case, the US has granted reparations for the takings of Black Hills against the strong resistance of the Sioux people who still desire to get back their sacred land. Frank Pommersheim observes:

"For the Sioux Nation, land restoration is a cornerstone cultural commitment. Economic considerations are important, but not as central. The Black Hills land is of primary importance because of its sacredness, its nexus to the cultural wellbeing of Lakota people, and its role as a mediator in their relationship with all other living things .... Land is inherent to Lakota people. It is their cultural centerpiece—the fulcrum of material and spiritual well-being. Without it, there is neither balance nor center. The Black Hills are a central part of this "sacred text" and constitute its prophetic core."[257]

This continuous struggle for the restoration of *Paha Sapa* is nothing but cultural-political-spiritual connection with sacred land for the Dakota, Lakota and Nakota people. Many scholars consider this takings as a method of exploiting Indian resources, dispossessing Indians and enforced cultural destruction.

The establishment of 'Greater Black Hills Wildlife Protected Area' without considering the long-cherished demand of Sioux Nation to restore their sacred land ultimately rests upon the Congress a responsibility to decide upon appropriate measure.[258] Developing environmental interests without consultation with the aggrieved Sioux people is against the interests of Native American community. It is the duty of Congress to protect and uphold tribe's interests. The 1980 decision did not apply the indigenous canons of construction and tribal concern, rather the court legalized the colonial efforts of grabbing land which has long-term economic, social, cultural as well as religious significance to Dakota, Lakota and Nakota community.

Reparation claim of Indigenous people in Black Hills context demands restoration of Black Hills to Sioux people. Whether Sioux Nation received their fair share in calculating damages along with other vital considerations of reparations was not an

[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *Id*.
[246] Gila River, *supra* note 107, 427 F.2d at 1195.
[247] *Id*.
[248] *Id*. (Nichols, J., concurring).
[249] 45 A.L.R. Fed. 680 (Originally published in 1979). *See also*, Nell Jessup Newton, *supra* note 15, 41 Am. U. L. Rev. 753, 777 (1992).
[250] *See* Gila River, *supra* note 107, (1972) 199 Ct Cl 586, 467 F2d 1351.
[251] *See* Howard J. Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 Buff. L. Rev. 981, 988 (2007).
[252] *Id*.
[253] *Id*.
[254] *See* Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 Wm. Mitchell L. Rev. 538, 579 (2013).
[255] *See* Matthew Atkinson, *supra* note 106 at 379, 382.
[256] *See* United States v. Sioux Nation, 448 U.S. 371, 374 (1980).
[257] *See* Frank Pommersheim, *Making All the Difference: Native American Testimony and the Black Hills (A Review Essay)*, 69 N.D. L. REV. 337, 352 (1993).
[258] *See* John P. La Velle, *supra* note 3 at 69.

appropriate form of remedy for this Tribe.[259] The denial of reparations on behalf of Sioux people demonstrated the growing injustice and dissatisfaction the Sioux people encountered during the last several decades since 1980. Devising a system for the proper assessment of damages including fair market value is a long-standing demand of Native Americans in other contexts of dispossession but not for Black Hills.[260]

The claims of Black Hills in South Dakota still unresolved and the Sioux Nation never accepted the reparations offered to them. The determination of reparations was not made considering the historical wounds, free, prior and informed consent of the Sioux Nation, and the present value of the area having its natural resources. Rather, the federal government suddenly changed provisions of the Fort Laramie Treaty 1868 that conveyed Black Hills to Sioux Nation. Their forced relocation aggravated the problems of land-settlement, their mental agonies and cultural way of life. The claims system in early ICC, then Court of Federal Claims, then federal court created a sense of injustice and deprivation for native people. The ongoing culture of impunity regarding land-grabbing and deprivation of reparations aggravate the discontent in native community to press their land claims and restoration of land.

The CFC in *Sioux* case emphasizes that in case of valuation of land interest for takings the court needs to consider several factors such as location of the land, the sale price of similar lands, actual use or disposition of the land after the taking etc.[261]Although the Supreme Court upheld the reparations amount provided to Sioux Nation for the takings of Black Hills, the continuing demand for the restoration of Black Hills to Sioux people and lapse of time has raised the fund up to $400 million.[262] Appropriate reparations not only include monetary damages, restoration of land and moral damages but also involvement of the indigenous community in the decision-making process. The Claims Court need to analyze the existing situation such as cultural and spiritual connection with land, subsistence etc. to provide appropriate remedies including restoration of tribal land to native community.[263] Right to reparation in the US context also refers to legal claims considering present possessory rights to restore land claims.

V. CONCLUDING REMARKS

International framework for settlement of land disputes and victim's right to reparation is a pro-indigenous setting as compared with Native American's right to reparation. IACHR recognizes the customary land rights that is a helpful tool to establish indigenous land claims. This regional court is a model for indigenous community to see how the land claims are successful and how intensively court addresses monetary and non-monetary damages with its implementation mechanism. IACHR is innovative in considering tribe's necessity, development, past wrongs, injustices, both monetary loss and mental sufferings while providing reparations. Developmental programs such as training program for government officials, funding in education, agriculture and investment sectors are pioneering approach of IACHR in establishing indigenous land claims based upon customary law. The international instruments recognizing land rights of indigenous community is robust and right-based. Proper implementation of these instruments lies in the good faith efforts of governments to make implementing legislations at the domestic level.

On the other hand, the first lacuna in reparations claims entails that the United States does not recognize aboriginal land title. This non-recognition of aboriginal title based upon customary law justified takings of tons of acres of land without any fair procedure or law. Moreover, doctrine of discovery, congressional plenary power and trust doctrine acts as hindrances to establish indigenous peoples' right to reparation that is recognized in all human rights Conventions and Recommendations. The US court set out narrow yardstick like specific fiduciary duty that works as a specific problem to make tribal land claim equivocal. Again, interpretation of the same statute by different courts sometimes produce different results. Furthermore, Congress is rigid and reluctant to legislate clearly on tribe's reparation right. Most of the cases, the commissions and courts seem averse to establish indigenous land claim and recognize tribe's right to reparations. There is rare instance where congress made specific law on tribe's right to reparations. The complex rules of ICC and CFC also made the implementation of reparation claim near impossible. Various legal barriers such as law of limitations, sovereign immunity, no prejudgment interest rule further dilapidated and complicated the process of land claim.

Upon ratification of ACHR, ADRIP, the United States would be committed to protect the human rights and traditional land rights of Native Americans both at international and national level. The single instance of Mary and Carrie Dann case illustrates the different role of ICC and Inter-American Commission.[264] Since ICC has no authority to restore ancestral land of Western Shoshone Tribe, it agreed to compensate the tribe against its will.[265] In fact, the Tribe's desire to get back the land was not considered. That was the reason to submit the said complaint in the Inter-American Commission. The Commission declared that the ancestral land rights of Mary and Carrie Dann sisters, members of Western

[259] *See* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 Ore. L. Rev. 245 (1982).
[260] *Id.*
[261] *See* United States v Sioux Nation, 448 U.S. 371, 387 n.17 (1980).
[262] Judith V. Royster, Michael C. Blumm and Elizabeth Ann Kronk, *Native American Natural Resources Law, Cases and Materials*, Third Edition, (2013) at 145-159.
[263] *Id.*
[264] Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 Wis. Int'l L.J. 51, 75–76 (2009).
[265] *Id.*

Shoshone Tribe was violated.[266] The Commission also found that Dann sisters land claim was not settled in accordance with fair procedure and international human rights norms.[267] Since the US did not ratify ACHR or accepted IACHR jurisdiction, the ultimate result stopped at the door of the Commission which has only persuasive authority. As long as the US would be disinclined to ratify international conventions, the Native Americans will not utilize the international and regional forum that is an epitome for them to implement their land claims. The best interest principle of the indigenous people as a foundational tool may guide and motivate all behind the scenario of indigenous land claims and tribe's right to reparation.

[266] *Id*.
[267] *Id.*