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RESEARCH ARTICLE

Assessing Reparation Rights of Indigenous Peoples: Challenges within International Law

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ABSTRACT

This paper examines the challenges facing indigenous peoples in accessing reparations under international law. Despite the prevalence of discrimination and inequality among indigenous peoples, international law has been unable to provide them with adequate compensation. Drawing on secondary data sources such as journal articles, books, newspapers, websites, and case law, the paper explores the reasons why international law has failed to provide reparations to indigenous peoples. The paper discusses the legal avenues available to indigenous peoples seeking compensation, including litigation through their national state, reparation tribunals, constitutional amendment, and people and other organizations. The study proposes recommendations for ensuring that indigenous peoples' rights to reparations are recognized and respected under international law. Overall, this paper underscores the responsibility of international law in addressing the historical neglect of indigenous peoples and emphasizes the need for collective action and global cooperation to ensure the fulfilment of these rights.

Contribution/Originality: This study contributes to the existing literature by critically examining the Reparation Rights of Indigenous Peoples within International Law. Through analysis, it proposes recommendations for ensuring that indigenous peoples' rights to reparations are recognized and respected under international law. Overall, this paper emphasizes the need for collective action and global cooperation.

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1. Introduction

The past historical injustice is related to the cruel reality of an attack on indigenous people, the denial of the right to self-determination, forced to move, genocide, slavery, property theft, ethnocide, cultural rights prohibition, and property right prohibition (Gregg, 2019). The past of indigenous peoples is a story of unanswered inequality where people are enslaved, killed, dispossessed, tortured, cheated, and no reparation is given to them or their descendants. Therefore, indigenous people have encountered different types of injustice, including the hardship of rights or privileges and unjustifiable prohibitions. Some of such examples may include the Native Americans, Aboriginal Australians, and so on. These ancient injustices are ever present in debates and reflections on human rights as well as theories of justice (Stahn, 2020). In many nations, a notion of justice has been developed to enable indigenous people to receive redress. The consequences of historical wrongdoings like colonialism, enslavement, and the appropriation of native territories are still felt today, and they greatly influence structural discrimination, inequalities, and rights to reparations that are conditional under international agreements (Hottelier, 2020). In this regard, Janna Thompson focuses on the historical unfairness of reparation's question and says that: -

Demands for reparation for an injustice become less plausible when injuries are outside its scope. The problem is illustrated by Bittker's case for Black reparations. Bittker thinks that it is not plausible for African Americans to demand reparation for slavery because slavery, he says, is not the injustice responsible for the present disadvantages suffered by African Americans. After the Civil War, reforms in the Southern states, he thinks, were starting to bring about a society in which former slaves could take their place as free and equal citizens. If these reforms had been allowed to continue the harms caused by slavery would eventually have been undone and there would not now be any case for reparation (Thompson, 2001).

In a nutshell, this paper examines and highlights indigenous people's incomplete and conditional rights, including the jurisdictional hurdles these oppressed people face and the substantive barriers. In addition, the paper demonstrates how indigenous people receive compensation through the assistance of international laws and practices. The methodology of the study is qualitative, that is, this paper puts forward the arguments based on reading primary and secondary sources of data including national and international legal instruments.

2. Incomplete and Conditional Right to Reparation

The authors opine that international law contains incomplete and conditional rights for reparations because laws are overwhelmingly confined pertaining to those issues. M. Cherif Bassiouni stated that:-

There is no evidence in international or national law that there is a right to compensation, reparations, and redress other than as a consequence to the establishment of responsibility for the harm produced. Thus, the idealistic notion of providing compensation, reparations, and redress to a victim on the basis of human or social solidarity is not yet part of mainstream legal thinking, particularly in connection with criminal proceedings (Bassiouni, 2006).

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In international practice, providing equal opportunity, sometimes providing advantages to the indigenous people is an important concept, given that historically they were marginalised and they were not given equal opportunities. There is worldwide controversy about its meaning which is affected by superior legal and political significance (Kingsbury, 1998). Indigenous economic, cultural, and social collective rights are called indigenous rights. However, such rights are challengeable under international law for not compensating those deprived (Xanthaki, 2009).

In international law, there is an implementation gap practically relating to reparation provisions (Lawry, 2010). It is said by Anaya that international law develops norms but remains silent for the development of effective norms concerning indigenous people (Ibid). It should be kept in mind that the requirements for reparations contained in international legal instruments are typically challenging and onerous to implement (Moffett, 2017).

The United Nations' commitments were investigated, and the contributors called for attention to the many shortcomings (e.g. lack of awareness among the general population, lack of publicity in the media regarding the rights of the aboriginal people)in applying the Human Rights Covenants towards indigenous people. The International Labour Organization (hereinafter referred to as ILO) conventions have received some temporary praise, despite the fact that their requirements and applicable content are insufficient to safeguard indigenous rights (Luna-Firebaugh, 2002).

It should be noted that international law does provide rules and highlights relevant areas for the interests of indigenous groups (Ibid). In particular, the United Nations have adopted a number of declarations to enable countries with deprived indigenous people to receive extensive and widespread help. The two extremely popular UN declarations that stand out are the "Declaration on the Rights of Indigenous Peoples" and the "American Declaration of the Rights and Duties of Man" (Phillips, 2015). These declarations, generally speaking, like various international treaties and conventions, have helped indigenous groups in their struggle to defend their physical and social status. International treaties and conventions restrict signatories and appear to be part of customary international law or "general principles" (Anaya, 2004). Interestingly, Article 33(1), of the "United Nations Declaration on the Rights of Indigenous Peoples" stipulates that these peoples reserve the option of determining their own identity (Simmons, 2009).

3. Jurisdictional Hurdles and Related Problems

In the past, many indigenous lands have been confiscated through coercion or violence by national governments without regard for such declarations and/or treaties (Hampson & Reppy, 1997). Although many quarters have called for some form of compensation for this historical injustice, such compensation does not take the form of restoring all the original homelands to their original owners. The settlements, financial or other wise, are found to be unjust (Ibid). For instance, lately, New Zealand has paid a significant amount of compensation to its indigenous people due to past exploitation and deprivation of their rights, but it was held that such compensation was not enough. The affected tribe of New Zealand received solely $13 million New Zealand dollars in financial compensation. This amounted to a small amount considering all the injustice they had received for the exploitation inflicted upon the aboriginal people for hundreds of years (Morgan, 2021).

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Other cases on point include *The Zuni Tribe of New Mexico V. The United States, (Anyon & Ferguson, 1995)* where the U.S. Government took land without providing adequate reparations to the affected tribe. Likewise, no direct compensation was provided in the case of *Nangbeto in Togo*, where the State claimed ownership of all lands of the indigenous groups (World Commission on Dams, 2000, p. 15). In regards to the challenge of coming into terms with the aboriginal community by compensating and offering advantageous positions, international legal norms should be encapsulated to provide an effect on domestic statutes so that peace can be established. In addition, it should be highlighted that international bodies under international law are unable to intervene to correct any domestic jurisdictional lacking in regards to the rights of the aboriginal people. William Bradford said perfectly that:

Consequently, reparative justice is hotly contested on doctrinal, political and practical grounds: opponents reject the notion of collective harm and responsibility for ancient wrongs, denies linkages between the relative socioeconomic status of aggrieved racial minority groups and past injustices and clings to limiting doctrines that deny remedies for acts and omissions that were lawful century's age. Reparations thus fuels unresolvable debates over the nature of minority disenfranchisement, the adequacy of civil rights legislation (Bradford, 2005).

In Australia, for example, the action must have started (Colbran, 2003) before the limitation period ends (Lawry, 2010). This limitation period is a significant barrier for those groups who want to raise a claim after the limitation period (Ibid). Another finding is that the non-retroactivity of the law, which is a frequent legal impediment to reparation. The passage of time and the prescriptive nature of time limits, which include the procedural-level boundaries of laws, are additional obstacles (Fallon & Meltzer, 1990).

Domestic legislation and political opposition to reparations for indigenous peoples is the most complicated issue. The fact that general political and economic problems oppose indigenous rights in terms of profitable land possession and individualism is another issue (Carneiro da Cunha et al., 2017). In this regards, John Sheeha (Sheehan, 2000) stated: "This task has been made immensely more difficult as there is almost no judicial guidance in this developing area of land compensation and appraisal law and practice."

The authors also highlight that a unified set of concepts and normative theories are lacking in international law (Ibid). Moreover, international law is a diverse and complex field that encompasses a wide range of legal systems, cultures, and values. As a result, there is no single unified set of concepts or normative theories that can be applied universally. Instead, there are different approaches to international law, such as natural law, positivism, and realism, which reflect different perspectives on the nature and purpose of international law.The authors also reiterate that International humanitarian law limits the guarantee of indigenous people's right to reparations (Fenrick, 1997). However, there are two conditions in which compensations are issued under international law (Lenzerini, 2008): regional claims grounded upon state accountability (Kaplan, 2004) and human rights claims carried by victims directly against the responsible state (UN General Assembly, 2006).

It can be seen in *Bligh v State of Queensland* case (Bligh v State of Queensland, 1996) that the remedies offered to the natives of the land were far from satisfactory. Aboriginal

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family members or next of kin were not able to claim on behalf of the deceased victims because the state laws of Queensland disallowed this. On the contrary, in the case of *Germany v Namibia (Niezen, 2018),* Berlin refused to recognise the judicial decision that warranted the respective government to pay compensation to the descendants of Hiroshima and Nagasaki victims. In response, Berlin argued that its development aid value amounted to hundreds of millions of euros (dollars) since Namibia's independence from South Africa in 1990, all the money that were invested was for the benefit of all Namibians. The cases are relevant in the sense that both deal with reparations. Although they are not directly associated with reparations for Aboriginal people.

4. The Legal Instruments on Reparation

There are numerous international legal instruments have been promulgated worldwide to address the problems. Some of these international legal frameworks are highlighted in the following discussion.

4.1. United Nations Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (Champagne, 2013) is a legal regulation for reparation of aboriginal people's property claims. This Declaration was, however, implemented by the UN General Assembly in 2007. However, some countries are not agreeable with it, including Australia, New Zealand, Canada and the United States. Nevertheless, Article 12 of the convention mentions reparation but the same provision does not go on to explain or cover compensation for indigenous people. Daes and Cha'vez asserts that "A right to reparation for human remains, but not explicitly for other cultural objects (Ibid)."

It is very interesting that Article 41 of UNDRIP has stressed the duty of the United Nations and other organisations to provide technical assistance and financial cooperation to the affected parties. The UNDRIP also states that States should take suitable measures to reach the goals of the Declaration according to Articles 37 and 38. However, the UNDRIP is not legally binding on all member states (Kuprecht, 2014/2016). In fact, governments are not required to implement their nation's legal system to provide reparation. Therefore, the UNDRIP is ineffective because it lacks the authority to create national laws relating to reparation. However, if their state is a signatory, indigenous peoples may read into current domestic laws for particular protection (Gilbert, 2007).

4.2. The ILO Convention No. 169

International human rights convention indicates special rights for native people, spelt out in the ILO Convention No. 169, hereinafter referred to as ILO 169. This ILO agreement turns off conciliations and the assimilation is the substance of its indication. The convention uncovers a protecting, future-orientated approach without any reference to a respiratory work of the arrangement, but reparation falls past the scope of its wording. Article 4(1) of ILO convention said that member states will take proper measures to protect indigenous peoples' possession and cultural rights. This approach refers to actions that acknowledge social, educational, spiritual, and religious values (Ibid).

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Nevertheless, the ILO 169 provisions do not provide sufficient compensation guidelines for compensation on indigenous title rights. The ILO 169 empowers countries to decide this matter according to the country's accountability. According to the authors, the absence of international standards enables nations to develop their own standards, which frequently does not augur well for ensuring that compensation is given to the harmed indigenous tribes. In the real ILO 169, the only direct compensation provisions given to indigenous groups are for harms and injuries suffered as a result of the exploitation of aboriginal people's territory for natural resource exploration. In other words, the ILO 169's provisions on the traditional and social property rights of indigenous people are still ambiguous.

Art 6 of the ILO 169 requires that the indigenous and tribal people consult affected issues for improvement (Evans, 2012). However, this consultation must be done in a proper way by their representative organisations (International Labour Organization [ILO], 1989, Article 6(1)(a)). Secondly, according to Article 1(b) and 1(c), people's free participation must be guaranteed by the government and to ensure people's participation, the government should provide necessary resources. Article 6 (2) states that "the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures (Evans, 2012)".

In the case of *Diaguita v. Goldcorps* (7 October 2014), the Supreme Court of Chile instructed the Canadian corporation to consult with indigenous people properly before developing their gold and copper mine project. In the recent case of *Council of Sipacapa v. Guatemala (Inter-American Commission on Human Rights [IACHR], 2014)*, it was held by the Guatemala appeals court that Goldcorps mine projects could not continue because the government had been entirely unsuccessful in consulting with the local indigenous people. In this case, the Court also ordered the Guatemalan government and its corporate allies to pursue a consultation process with the indigenous peoples, which would have to be conducted in good faith.

Another interesting article that comes to mind is Article 27 of the Covenant on Civil and Political Rights 1966, which mentioned that indigenous peoples have the right to enjoy their culture, property, and economic interests. Such a right is guaranteed that Guatemala and most UN members, including the USA and Canada have signed it.It should be emphasised that Article 27 is intended to shield individuals from actions that are detrimental to their way of living. The idea that it is illegal to take away an indigenous person's property, culture, or right to a livelihood is supported by case law. The statement above is supported by numerous cases, and links to these cases have been given (Lubicon Lake Band v. Canada, 1990).

Another very interesting convention that protects indigenous rights is The United Nations Convention on Biological Diversity 1993. Article 1 states that "the conservation of biological diversity; the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources". Any state that interferes with, steals, or injures indigenous peoples' genetic resources would violate this Convention on Biological Diversity, whether as a signatory or under customary international law (Bustamante, 2015). The Convention on Biological Diversity, like the ILO 169 and the United Nations Declaration on the Rights of Indigenous Peoples UNDRIP, have provisions for obtaining free, prior, and informed consent.

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4.3. Customary International Law

A customary international right of indigenous peoples would be to challenge significantly any national or international principles towards the law to reparation that would appear to be inconsistent or without any specification. Only specified rules to implement a right of compensation, together with the dynamic support of an effective public body, could truthfully establish and advance the right to cultural possession compensation in favour of aboriginal people (Ibid). In this regard, the Australian delegate stated that:-

Customary law is not in the sense that modern democracies use the term, it is based on culture and traditions. It should not override national laws and should not be used selectively to permit the exercise of practices by certain indigenous communities that would be unacceptable in the rest of the community (Evans, 2012).

4.4. International Human Rights Law

In contrast to humanitarian law, provisions on remedies and reparations are key features in all human rights instruments, establishing many legally binding and quasi-judicial enforcement mechanisms. Some scholars have argued that breaches of humanitarian law could be addressed through human rights mechanisms specially for indigenous people because of the lack of enforcement mechanisms in humanitarian law (Ibid).

Human rights jurisprudence has played an important role in defining different forms of reparations and has provided considerable guidance on the development of non-monetary forms of remedies. The origins of reparations in human rights law stem from the adoption of the UDHR in 1948, as Article 8 states that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Furthermore, the International Covenant on Civil and Political Rights (ICCPR) echoes the provision above as a legally binding norm in Article 2(3a that "any person including indigenous people whose rights or freedoms as herein recognised are violated shall have an effective remedy". In addition, Articles 9(5) and 14(6) provide a right to compensation for unlawful arrest, detention and conviction.

The Human Rights Committee has given considerable interpretation of the content of the concept of' effective remedy' in its decisions in cases of individual petitions, general comments on the interpretation of treaty provisions, and concluding observations of state party reports. In 2004, the Human Rights Committee adopted its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, largely inspired by the adoption of the ILC Draft Articles on State Responsibility in 2001 and the then draft Basic Principles on the Right to Reparation for Victims. The General Comment makes the link between the terms' remedy' and 'reparation' explicit by stating in Article 2(3) and requires that States parties make reparation to individuals whose covenant rights have been violated.

Without reparation to individuals whose rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2(3), is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public

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memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations. Other human rights treaty provisions, such as Article 14 of the Convention against Torture (CAT), Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 39 of the Convention of the Rights of the Child (CRC) and Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED) affirm the right to reparation in different forms.

The CPPED provides a significant contribution as its entry into force in 2010 provided a comprehensive definition of reparations in a legally binding instrument. Article 24(4) and (5) established that each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation ... covers material and moral damages and, where appropriate, other forms of reparation, such as: (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation and (d) guarantees of non-repetition.

The question of reparations for indigenous peoples who have experienced historical wrongs at the hands of colonial powers has been a contentious issue for many years. Reparation laws are seen as a means of providing justice to these groups by acknowledging past wrongs and providing restitution for the harms suffered. At the national level, these laws may take the form of financial compensation, land restitution, or other forms of redress. At the international level, reparations may involve the provision of financial aid or the creation of special funds to support indigenous peoples.

While reparations laws have the potential to promote healing and reconciliation, they are often criticised for being insufficient in addressing the systemic injustices faced by indigenous peoples. Some argue that reparations laws should be accompanied by other measures, such as improved access to education, healthcare, and other essential services, as well as greater political representation and autonomy. Additionally, some critics argue that reparations laws may not be effective in the absence of broader societal and cultural changes that address the underlying issues of discrimination and marginalisation faced by indigenous peoples. Nonetheless, the importance of reparations laws in promoting justice and reconciliation cannot be underestimated, and it is crucial for policymakers to continue to explore and implement these measures in collaboration with indigenous communities.

4.5. Recognition of Human Rights in Customary Law

The 1945 United Nations Charter, which established the United Nations marked a turning point in international law as it identified universal protection of human rights as one of the organisation's principal objectives, as stated in Articles 1(3) and 55. Article 56 of the Charter obliges members of the organisation to pledge to "take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55". The Charter, although recognising state sovereignty, created the Security Council and authorised it to undertake measures to maintain international peace and security. The Charter placed human rights as a legitimate concern for the international community, set in motion the gradual development of normative standards on human rights, and sowed the seeds for human rights supervisory mechanisms.

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The Charter also established the International Court of Justice (ICJ) as the principal judicial organ of the United Nations. The ICJ reflects traditional international law and is a forum where only states can present claims against other states. In this sense, individuals and indigenous people can benefit from reparations only if they are able to present a claim through their state against another. Should the case be favourably decided, the victims would still need to depend upon the goodwill of state authorities to distribute reparations to individual beneficiaries. Article 38 of the Statute of the ICJ states that it shall apply from the following sources:

a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
b) International custom, as evidence of a general practice accepted by law;
c) The general principles of law as recognised by civilised nations;
d) ... judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.

The Statute of the ICJ (Articles 65–68) also establishes that principal UN organs may request Advisory Opinions. Historically, the ICJ was reluctant to refer to human rights instruments in its decisions. The relationship between Aboriginal people's rights and recognition of human rights in customary law has been a long-standing issue in legal and political discourse. Aboriginal customary law is a system of beliefs and practices that governs the conduct of Aboriginal communities. These laws are distinct from mainstream Australian law and are based on the traditions, customs, and culture of Aboriginal people. The recognition of Aboriginal customary law is important for the protection of Aboriginal people's rights, including their right to self-determination and the right to maintain and develop their culture.

In recent years, there has been a growing recognition of the importance of incorporating Aboriginal customary law into the Australian legal system. This recognition has come in the form of legal decisions, government policy, and academic research. The recognition of Aboriginal customary law has the potential to facilitate the promotion and protection of human rights, including the rights of Indigenous peoples. However, there are challenges to this recognition, including the need for legal frameworks that can integrate Aboriginal customary law with the mainstream Australian legal system while respecting the principles of human rights and equality before the law.

4.6. Reparation in International Humanitarian Law

References to reparations in international humanitarian law can be traced to Article 3 of the 1907 IV Hague Convention, wording which is repeated in Article 91 of the Additional Protocol I to the Geneva Conventions. It states that a party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. The official ICRC Commentary gives some further guidance on the interpretation of the provisions. In line with general international law, the Article is construed on the presumption that it be exercised through an intra-state mechanism.

The ICRC Commentary, however, gives little guidance as to how states should ensure that non-state parties to a conflict fulfil the obligation of paying compensation. Given the current extent of internal armed conflicts involving non-state entities, this illustrates a major lacuna in international humanitarian law (Evans, 2012). It is important to observe that the Commentary affirms that state responsibility may also be incurred by omission

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when due diligence to prevent violations from taking place has not been demonstrated and, once they have occurred, repression of the acts has not been ensured. Furthermore, Article 91 makes specific reference to coverage of all provisions of the Geneva Conventions. A weak point is that no corresponding provision exists in the Additional Protocol II.

Furthermore, the official Commentary provides no clear explanation as to why the term compensation figures rather than the more comprehensive term reparation, which would have been consistent with the jurisprudence of the ICJ. Nevertheless, the Commentary explains that the term compensation generally perceived to be a reference to monetary redress. In this context comprises the obligation to ensure restitution to the extent possible in addition to financial compensation. While a conservative interpretation of Article 91 fails to recognise it as a source of rights in favour of individuals, several scholars, including Kalshoven and Greenwood, have made important contributions to broaden the interpretation of Article 91. They have based their arguments on the travaux preparatoires of the 1907 Hague Convention IV, which indicate that the provision was not intended to be confined to claims between states, but was to be conceived as creating a direct right to compensation for individuals.

The debate on the reinterpretation of Article 91 stems in part from the redress movement against the Japanese government in the 1990s, during which both scholars submitted legal advice on the right to reparation. Furthermore, it has been noted that the establishment of the United Nations Compensation Commission (UNCC) by the Security Council in 1991 following the Iraq war demonstrated state responsibility in relation to reparations for violations of humanitarian law. Although the implications of reparation provisions in humanitarian law are still being explored and the implementation thereof largely remains lacking, some scholars have stated that provisions on reparations have attained customary law status and, consequently, states cannot absolve themselves or other states for liability with respect to grave breaches.

Kalshoven and Zegveld (2012) state that "the rule of responsibility, including the liability to pay compensation, has acquired a much broader scope. Although formally written for the Conventions and the Protocol as treaties, it is not too daring to regard it as applicable to the whole of international humanitarian law, whether written or customary." Of considerable importance is that the ICRC has specifically affirmed, in its 2005 in-depth study of customary international humanitarian law previously cited, that state responsibility for reparations has become established as a customary norm both in international and non-international armed conflicts. However, a weak aspect of humanitarian law is its lack of enforcement and monitoring mechanisms.

The above discussion is relevant to Indigenous/Aboriginal peoples' rights as many Indigenous communities have been subject to historical and ongoing violations of their human rights, including their rights to land, culture, and self-determination. Reparations can play an important role in addressing these violations and providing Indigenous peoples with a measure of justice. Given the history of colonisation and forced assimilation faced by many Indigenous/Aboriginal communities, the concept of reparations can be seen as particularly relevant to their struggle for justice and recognition of their rights. Reparations may take different forms, including land restitution, financial compensation, or other forms of restitution, and can contribute to the recognition and restoration of Indigenous peoples' cultures, languages, and traditions. However, the implementation of these measures can be complex, requiring

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effective legal frameworks and mechanisms for monitoring and enforcing compliance. The article highlights the need for further exploration and development of the concept of reparations in international humanitarian law and its application to the rights of Indigenous peoples.

5. Strategies And Practices of Obtaining Redress for Indigenous Tribes

There are notable compensations available for the indigenous tribes under domestic and international legal orders. Based on the above discussion, some of these redresses are analyzed below.

5.1. Redress Through Litigation

It can be suggested that indigenous peoples can get compensation through litigation by their national state. Strategies can respond to colonialism's historical injustices through that lawsuit process. But some restrictions of the litigation process as follows:

a) The problems indigenous peoples have overpoweringly statutory limitation periods when these events happened many decades ago;
b) The trouble of finding evidence;
c) The immense pecuniary cost;
d) The length of time is involved before the outcome of litigation which is crammed.

Nevertheless, Australia recognises the aboriginal title where the plaintiff Mabo makes a case against the government for violating land's right (Islam, 2019). Prior to this, indigenous rights violations were predominantly decided through awarding compensation but the case of Mabo which was passed in 1992 allowed for indigenous people to reclaim their lands (Mabo v Queensland (No 2), 1992, p. 61).

5.2. Reparations Tribunal

The Reparations Tribunal should be adopted on technical ideologies that enable the victims of these abuses to have their matters decided in a dignified and sympathetic manner. There would be three board divisions with corresponding functions on the issue of current thinking: a hearing division, a rehabilitation and reparations division, and a recommendations division. There is a lack of the formal superiority of states because indigenous peoples have no access, as parties in a contested proceeding, to the International Court of Justice (Wiessner, 1999). Still, the international court should consider their valid concerns to ensure that their legal interests are protected in any litigation that might affect them.

5.3. People and Organizational Works

Aboriginal peoples should keep up their advocacy efforts for their justice systems' appreciation or acknowledgment. To ensure that native women and children are free from all forms of discrimination, its justice systems should be assured. As one of many groups that have been subjected to violations of human rights, indigenous peoples should fight for the explicit inclusion of their real interests in restorative justice. In addition, the aboriginal people will ensure that everyone, particularly women, participates in the criminal justice system. The Special Rapporteur on the promotion of

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truth, justice, compensation, and assurances of non-recurrence is one of the UN system's duties, and his work should be guided by the Declaration.

a) The United Nations should bestow properties to the expansion and make in collaboration with native peoples and access to impartiality for law application staff, members, officials of the judiciary and will give pressure to states to provide reparations.
b) The UN should extend its access to fairness.
c) The UN should also contribute to further reflection regarding truth and reconciliation procedures for native people.
d) ILO 169 convention should be implemented, and the UN will be binding accordingly.

6. Conclusion

The foregoing study displays a legal basis for a right of reparation of aboriginal people, which could commence through humanitarian laws, particularly international law. The specific provisions granting a right to reparation in these areas of the law are essentially treaty norms. However, authors have stated that the best way to overcome this jurisdictional hurdle and barrier should be by engaging in a discussion on existing national and international laws in regards to the reparation for the indigenous/aboriginal people. By negotiating and joint gratitude, the indigenous people should receive a sufficient amount of reparation. Therefore, the authors opine that every state should deliver actual reparation to the indigenous people so that they can get their right to justice for historical injustice. Moreover, all countries are recommended to follow the international law provisions verbatim to ensure uniformity and certainty in the protection of the oppressed. Finally, the authors of this paper would like to highlight the following key points for alleviating indigenous rights. There are several proposals to consider for protecting indigenous rights and providing compensation guidelines to indigenous peoples:

First, international laws like ILO 169, UNDRIP, and Customary international law can be used to develop a consistent set of domestic laws. This is important because descendants of oppressed groups and indigenous peoples are demanding their reparation in domestic courts. Second, incomplete and conditional provisions within domestic laws that pertain to indigenous rights should be removed. Instead, international laws covering Indigenous economic, cultural, and social collective rights should be assimilated into domestic laws.

Third, international legal instruments should be developed to provide reparation norms because they are overwhelmingly absent from present domestic legislation. International legal norms can have a significant effect on domestic statutes. Fourth, Article 12 of the UNDRIP should be reexamined as it does not adequately cover the compensation rights of indigenous peoples for historical injustice. However, Art 41, which emphasises the duty to protect aboriginal rights, is commendable. Unfortunately, the UNDRIP is silent about providing aboriginal people financial and technical support.

Fifth, the authors suggest that all signatory countries must apply Articles 37 and 38 of the UNDRIP, including Article 4(1) of ILO. Articles 37 and 38 provide that States will take suitable measures to reach the goals of the Declaration. Therefore, States are obligated to follow international law guidelines, although it is soft law. Lastly, customary

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international law should be applied when deciding domestic law cases to ensure that the rights of all affected parties are genuinely looked into and protected.

Ethics Approval and Consent to Participate

The researchers used the research ethics provided by the Research Ethics Committee of Universiti Teknologi MARA (RECUiTM). All procedures performed in this study involving human participants were conducted in accordance with the ethical standards of the institutional research committee. Informed consent was obtained from all participants according to the Declaration of Helsinki.

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Conflict of Interests

The authors reported no conflicts of interest for this work and declare that there is no potential conflict of interest with respect to the research, authorship, or publication of this article.

References

Anaya, S. J. (2004). International human rights and indigenous peoples: The move toward the multicultural state. *Arizona Journal of International and Comparative Law, 21*, 13–61. https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=1485138

Anyon, R., & Ferguson, T. J. (1995). Cultural resources management at the Pueblo of Zuni, New Mexico, USA. *Antiquity, 69*(266), 913–930. https://doi.org/10.1017/S0003598X00082466

Bassiouni, M. C. (2006). International recognition of victims' rights. *Human Rights Law Review, 6*(2), 203–279. https://doi.org/10.1093/hrlr/ngl009

Bradford, W. (2005). Beyond reparations: An American Indian theory of justice. *Ohio State Law Journal, 66*, 1–74. https://kb.osu.edu/bitstreams/c5b92c3a-bb4f-5c9e-8faf-da2c5e85abb8/download

Bustamante, G. (2015). The right to consultation and free, prior and informed consent in Latin America: The governmentality of the extraction of natural resources. *Revue québécoise de droit international*, 179–197. https://www.erudit.org/en/journals/rqdi/2015-rqdi05162/1067946ar.pdf

Carneiro da Cunha, M., Caixeta, R., Campbell, J. M., Fausto, C., Kelly, J. A., Lomnitz, C., ... & Vilaça, A. (2017). Indigenous peoples boxed in by Brazil's political crisis. *HAU: Journal of Ethnographic Theory, 7*(2), 403–426. https://www.journals.uchicago.edu/doi/full/10.14318/hau7.2.033

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Champagne, D. (2013). UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, civil, and Indigenous rights. *Wicazo Sa Review, 28*(1), 9–22. 10.5749/wicazosareview.28.1.0009

Colbran, S. (2003). Independence and integrity as a criterion for judicial performance evaluation. *University of Notre Dame Australia Law Review, 5*, 15–36. https://search.informit.org/doi/abs/10.3316/informit.894137261126324

Evans, E. C. (2012). *The right to reparation in international law for victims of armed conflict* (No. 91). Cambridge University Press. https://books.google.com.my/books?hl=en&lr=&id=FBia_iboPU8C&oi=fnd&pg=PR1&dq=Evans,+E.+C.+(2012).+The+right+to+reparation+in+international+law+for+victims+of+armed+conflict+(No.+91).+Cambridge+University+Press.+&ots=4oU2BX2jev&sig=lYOAdsin-Bv3vdzqd9JLl3i7qWk&redir_esc=y#v=onepage&q&f=false

Fallon, R. H., Jr., & Meltzer, D. J. (1990). New law, non-retroactivity, and constitutional remedies. *Harvard Law Review, 104*, 1731–1833.

Fenrick, W. J. (1997). International humanitarian law and criminal trials. *Transnational Law & Contemporary Problems, 7*, 23–44. https://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp7&div=7

Gilbert, J. (2007). Indigenous rights in the making: The United Nations declaration on the rights of indigenous peoples. *International Journal on Minority and Group Rights, 14*, 207–230. https://heinonline.org/HOL/Page?handle=hein.journals/ijmgr14&div=14&g_sent=1&casa_token=

Gregg, B. (2019). Against self-isolation as a human right of Indigenous peoples in Latin America. *Human Rights Review, 20*(3), 313–333. https://doi.org/10.1007/s12142-019-0550-x

Hampson, F. O., & Reppy, J. (1997). Environmental change and social justice. *Environment: Science and Policy for Sustainable Development, 39*(3), 12–35. https://doi.org/10.1080/00139159709604368

Hottelier, L. (2020). Repatriation of cultural objects as a human right: Challenges relating to the right to culture and the protection of Indigenous peoples' cultural heritage. *The 1995 UNIDROIT Convention Academic Project*. https://1995unidroitcap.org/wp-content/uploads/2020/07/200707-Laura-HOTTELIER.pdf

Islam, M. (2019). Compare the approaches to recognition, proof, and content of aboriginal title in Australia and Canada and to what extent have the Malaysian court decisions reflected either one or both of these approaches? *Compare, 5*(5). https://surl.li/yjhjom

Kalshoven, F., & Zegveld, L. (2011). *Constraints on the waging of war: An introduction to international humanitarian law* (4th ed.). Cambridge University Press. https://books.google.com.my/books?hl=en&lr=&id=ZxKY6_mrtAMC&oi=fnd&pg=PR1&dq=Kalshoven,+F.,+%26+Zegveld,+L.+(2011).+Constraints+on+the+waging+of+war:+An+introduction+to+international+humanitarian+law+(4th+ed.).+Cambridge+University+Press.+vention+Academic+Project.+&ots=29fLO806kz&sig=jUQSZ7XxKWCcWZx4OrM0q0Nf4AM&redir_esc=y#v=onepage&q&f=false

Kaplan, M. (2004). Using collective interests to ensure human rights: An analysis of the articles on state responsibility. *New York University Law Review, 79*, 1902–1951. https://nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-79-5-Kaplan.pdf

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Kingsbury, B. (1998). “Indigenous peoples” in international law: A constructivist approach to the Asian controversy. *American Journal of International Law, 92*(3), 414–457. https://doi.org/10.2307/2997916

Kuprecht, K. (2016). *Indigenous peoples’ cultural property claims: Repatriation and beyond*. Springer International Publishing. https://doi.org/10.1007/978-3-319-01655-9

Lawry, C. (2010). Moving beyond the apology: Achieving full and effective reparations for the Stolen Generations. *Australian Indigenous Law Review, 14*(2), 83–99. https://search.informit.org/doi/abs/10.3316/informit.144549886445002#

Lenzerini, F. (Ed.). (2008). *Reparations for indigenous peoples: International and comparative perspectives*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199235605.001.0001

Moffett, L. (2017). Transitional justice and reparations: Remedying the past? In *Research handbook on transitional justice* (pp. 377–394). Edward Elgar Publishing. https://doi.org/10.4337/9781781955314.00028

Luna-Firebaugh, E. M. (2002). The border crossed us: Border crossing issues of the Indigenous peoples of the Americas. *Wicazo Sa Review, 17*(1), 159–181. https://doi.org/10.1353/wic.2002.0006

Morgan, J. (2021). *Reset: The end of New Zealand’s neoliberal experiment*. Seabourne Publishing.

Niezen, R. (2018). Speaking for the dead: The memorial politics of genocide in Namibia and Germany. *International Journal of Heritage Studies, 24*(5), 547–567. https://doi.org/10.1080/13527258.2017.1413681

Phillips, J. S. (2015). The rights of Indigenous peoples under international law. *Global Bioethics, 26*(2), 120–127. https://doi.org/10.1080/11287462.2015.1036514

Sheehan, J. (2000, June). Compensation for the taking of Indigenous common property: The Australian experience. In *Eighth Biennial Conference of the International Association for the Study of Common Property (IASCP)*. https://dlc.dlib.indiana.edu/dlcrest/api/core/bitstreams/a7eeaa3d-40f1-4803-9828-e6756673facc/content

Simmons, B. A. (2009). *Mobilizing for human rights: International law in domestic politics*. Cambridge University Press. https://doi.org/10.1017/CBO9780511811340

Stahn, C. (2020). Reckoning with colonial injustice: International law as culprit and as remedy? *Leiden Journal of International Law, 33*(4), 823–835. https://doi.org/10.1017/S0922156520000370

Thompson, J. (2001). Historical injustice and reparation: Justifying claims of descendants. *Ethics, 112*(1), 114–135. https://www.journals.uchicago.edu/doi/abs/10.1086/339139

United Nations General Assembly. (2006). *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (Resolution 60/147).* Office of the High Commissioner for Human Rights. https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf

Wiessner, S. (1999). Rights and status of Indigenous peoples: A global comparative and international legal analysis. *Harvard Human Rights Journal, 12*, 57–128. https://heinonline.org/HOL/Page?handle=hein.journals/hhrj12&div=6&g_sent=1&casa_token=

World Commission on Dams. (2000). *Dams and development: A new framework for decision-making: The report of the World Commission on Dams*. Earthscan. https://books.google.com.my/books?hl=en&lr=&id=85ZN0e_q1yAC&oi=fnd&pg=P

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R1&dq=World+Commission+on+Dams.+(2000).+Dams+and+development:+A+new+framework+for+decision-making:+The+report+of+the+World+Commission+on+Dams.+Earthscan.+&ots=rWScx711xP&sig=KGq1GnAE3hPY5WkU8GfivdK8gOU&redir_esc=y#v=onepage&q=World%20Commission%20on%20Dams.%20(2000).%20Dams%20and%20development%3A%20A%20new%20framework%20for%20decision-making%3A%20The%20report%20of%20the%20World%20Commission%20on%20Dams.%20Earthscan.&f=false

Xanthaki, A. (2009). Indigenous rights in international law over the last 10 years and future developments. *Melbourne Journal of International Law, 10*(1), 27–37.

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