COLLECTIVE COMPENSATION AS A LEGAL TOOL OF MINORITY POLICY?

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Introduction

The case for collective compensation—payment based on both historical injustices and group membership—is not at all obvious. French negotiators on compensation claims touched upon the heart of the problem when they 'found it 'abhorrent' for Jewish survivors to recover funds based solely on their religious affiliation, and not on hard evidence that they or their families had personally lost assets in French banks.'[1] Another valid counterargument could point out that collective compensation is the other side of collective responsibility—which is long discredited in the public discourses. Or, one could add, collective compensation seems to build on the same kind of membership criteria as the one applied by the perpetrators, in a way duplicating the discriminatory practices that are sought to be remedied.

But these arguments are well known from the criticism towards equality policy measures, and one could easily answer with the golden rule of minority protection from Justice Blackmun (the Bakke case): 'In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.'[2]

But what do historical claims have to do with minority protection measures? What can be the role of the collectivity in the world of compensations, where damage should usually be proved and individualized? Existing legal norms take either the remedial approach, and focus on the individual, or choose the 'minority policy' track, often declaring principles without actual material guarantees.[3]

1 Jon Elster, 'Conclusion,' in *Retribution and Reparation in the Transition to Democracy*, edited by Jon Elster (s.l.: Cambridge Univ. Press, 2006), p. 320. Quote from Stuart Eizenstat, 'Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II.' *Public Affairs* 2003, p. 307.

2 University of California Regents v. Bakke, 438 U.S. 265 (1978)

3 See Chapter 2

Is it more just to leave the benefits with the perpetrators, or there is a way to return to the group of victims that part of the compensation which otherwise would not be claimed, e.g. due to a lack of surviving family members?[4] Can a tribe that suffered acts of genocide be compensated merely on an individual basis? And, following the track of criminal law, what sanction can make sure that perpetrators will not keep the profit flowing from the crimes? Empowering the victims, helping them reclaim all aspects of their destroyed living circumstances can be a more effective and meaningful sanction than 'traditional,' punitive forms of punishment.[5]

To better understand the actual topic of the thesis, collective compensation, we should briefly review what two components.

Compensation is, in short, a legal formula based on the moral principle that obliges persons 'to give to every one his due.' In 1962, Justice Guha Roy of India wrote: 'That a wrong done to an individual most be redressed by the offender is one of those timeless axioms of justice without which social life is unthinkable.'[6] According to Black's Law Dictionary, compensation—among others—means 'payment of damages, or any other act that a court orders to be done by a person who has caused injury to another.'[7] Although this definition is focused on individuals and on the judicial process, it shows the centrality of a damage caused by a past injury. Compensation also entails liability, a causal link between the receiver of the compensation and the one who is obliged to pay it. The aim is to 'restore justice,' and provide remedy for an unbalanced situation. As the dictionary adds, 'compensation makes the injured person whole.'

4 Not to mention the issue of the inheritableness of claims for compensation.
5 See the *Plan de Sánchez Massacre v. Guatemala* case in Chapter 4
6 Dinah Shelton, *Remedies in International Human Rights Law*, Second Edition (New York: Oxford University Press, 2005), 9
7 Black's Law Dictionary (8th ed. 2004), compensation 2.

As we can see, compensation is not limited to material remedies, it can involve all kinds of other acts like public apology, expressing the commitment that no repetition of the original act will be allowed etc. Present paper will focus on the material instruments, because they tend to be more sensitive (and legally more problematic) than mere symbolic acts. The financial burden of compensation usually remains contested even in case of the full acknowledgment of the responsibility.[8]

The term '*collective*' means in this context that the decision is not made on an individual basis, and though individual claims can be considered, the measure itself is not individualized. We should note that individualization can follow the grant of a collective compensatory award, this in itself does not touch upon the collective nature of the original decision. It is indeed a solution that may strengthen the case for collective compensations: the collectivity can decide on the logic of the distribution—on the institutional and procedural framework—thus delegating competence to the minority, strengthening practices of effective participation, while, in the meantime, it can assure that claims are considered individually.

To say the least, the case of collective compensation in international law is controversial. It is probably not by chance that the encyclopedic work on 'Remedies in International Human Rights Law' deals with collective claims as a procedural question.[9] It is the Inter-American Court that considered and decided in favor of indigenous *group claims*, directly referring to the distinct importance of collectivity in the concerned indigenous traditions.[10]

As we will see in Chapter 1, a compensation qualifies as collective—on the side of the victims—if proving membership prevails over the proof of an actual injury, e.g. by alleviating

8 We should note that the step from denial to acknowledgment seems more interesting and decisive—mainly from a psychological or socio-psychological perspective—but the actual legal response is more problematic in case of a full compensation, including material remedies.

9 Shelton 2005, 246, 6.1.4

10 See the *Aloeboetoe* case: Aloeboetoe et al. Case, Judgment of December 4, 1991, Inter-Am.Ct.H.R. (Ser. C) No.11 (1994). Summed up in Shelton 2005, 246

the burden of proof (N.B.: once the 'collective suffering of the injustice' was proven). This can be seen as a form of 'class action'—the American way of saving time and effort in case of similar claims.[11] Note however that references to individual injuries do not make the claim individual.

Mixed solutions are possible, as the case of Jewish organizations for World War 2 compensations shows. The assets of the 'Conference on Jewish Material Claims Against Germany'[12] include both individualized (but collectively negotiated) and collective compensations, and the thus acquired funds are not distributed based solely on the scale of the individual injury (or material damage), but can serve the goal of assisting the needy elderly victims of the Nazi regime.

This example also raises the dilemma of whether claims can be inherited (like property rights), whether the collectivity can inherit the assets that were not claimed by victims (supposedly due to lack of survivors or information in the concerned family). The answer of collective compensation is similar to the logic of inheritance law, though it includes a wider group of individuals: while there are potential heirs that are (socially: kin-relation, wider family, or ethnicity) closer to the victim(s), the property cannot fall on to the state. This rule is at the same time a stronger guarantee that the unlawfully acquired assets do not enrich the perpetrators or accomplices.

The aim of this thesis is to see the chances for collective compensatory measures as legally grounded claims—a possible shift from political aims to enforceable claims. To see these chances, the thesis will examine two specific case in more details, the Aboriginal and the Sami land claims. A review of both jurisprudential and legislative documents—and the

11 Federal Rules of Civil Procedure, Rule 23. Class Actions. Available e.g. at http://www.law.cornell.edu/rules/frcp/Rule23.htm (last accessed on May 26, 2009)

12 See the list and the explanation: http://www.claimscon.org/?url=about_us/liquid-assets or a more detailed account: http://www.claimscon.org/audit/ (last accessed on 05/04/2009)

interrelation between them—will help us to answer questions whether these demands concern basically the past, and involve arguments of establishing justice, or they are more of a project for the future, trying to preserve the community of the minority group; or whether it is essentially a question of doing justice or of safeguarding distinctiveness. My assumption to be verified is that these regulations cannot be understood without taking into account concerns of minority protection, and that the minority policy aspect largely prevail over the compensation centered view. In brief: 'collective' is more decisive than the sole fact that it is a 'compensation'. This concern explains in large part why individual claims alone are not sufficient.

The thesis addresses the goals and possibilities of collective compensation for ethnic and national minorities.[13] Collective compensatory claims are usually formulated as political aims, but legal references are getting involved as well. Such demands can find more and more basis in international documents, and especially indigenous rights related documents mention land property as a direct basis of their autonomy. Nevertheless these claims remain even more contested than collective rights in general, just like the adoption of economic, social and cultural rights was more controversial than that of civil and political rights.

The thesis will provide examples where such claims are raised, based on historical and/or minority protection arguments, focusing on the legal aspect. Such reasoning backs up many of the minority claims for special representation rights, affirmative action, but the compensatory claims are probably the *par excellence* case for historical arguments. Furthermore, land claims or other specific rights can be legitimized as necessary for the exercise of cultural rights as member of a group.[14]

13 Collective compensation claims based exclusively on environment related liability will not be directly addressed. See the Convention on Biological Diversity and the related arrangements drafted in the United Nations Environment Program, Division of Environmental Law and Conventions on such issues. http://www.cbd.int

14 See Article 26 of the International Covenant on Civil and Political Rights.

To be able to deal with the concrete cases, we have to look at the 'roots,' the fields where collective compensatory measures can be raised. The thesis will review the issue of material guarantees for minority rights, and the role of compensation in this context, then the question of collective rights. A review of the relevant international documents will give us a sense on the actual status of the recognition of compensatory and collective claims. A classification of the cases will provide us a context for discussing the actual case studies.

But before discussing these constituting elements, I should refine my focus. As the notion of 'collective compensation' can refer to a wide range of measures, the present thesis will have a narrower scope and will only deal with those cases that can be directly linked to *minority protection*: ethnic and national minorities, indigenous peoples.[15]

To see the complexity of this refinement, let us me refer to a concrete case where collective compensatory claims were raised. Indirectly, collective compensation based on environmental liability and according compensation can become as a tool of minority protection, as the case of the Bikini Atoll shows, though here the focus is slightly different due to the specific context of the injury. In the concrete case, the United States carried out a series of nuclear bomb tests on a territory under its trusteeship—a status that should have assured the inhabitants adequate protection, something that was not provided; no detailed information, health care assistance was given, and even charges of human experiments appear in the debates.[16] Soon after their relocation to a smaller island, they were found to be a

15 Groups considered today as immigrants (meaning more or less new immigrants) are typically not considered to be entitled to any kind of compensation. Though we can refer e.g. the case of the Yugoslav immigrants in Germany after World War 2, this is more of a compensation based on individual proof of injury, with an underlying bilateral agreement of the two countries.

16 The US Naval Historical Center acknowledges the special purpose of the experiments, but there is no mention of humans: 'The series was intended to study the effects of nuclear weapons on warships, equipment, and material. These tests would provide important information on the survivability of warships in the event of nuclear war. Both the Navy and the Army Air Forces were, given the possible budgetary effects of such tests, very interested in the outcome of these experiments. From a scientific point of view, technical experiments were also planned on nuclear weapon explosion phenomena and radiation contamination.' Department of the Navy – Naval Historical Center. Operation Crossroads: Bikini Atoll. http://www.history.navy.mil/ac/bikini/bikini1.htm (last accessed on 05/06/2009)

'starving people,'[17] under circumstances that hardened their situation and loss of traditional homeland.

The specificities of environmental damages are reflected in the UN Convention on Biological Diversity[18] and the working group findings on the possible role of 'collective compensation arrangements in international environment-related liability instruments.'[19] Here, it is hard to imagine damage without a collectivity, and collective actions are obviously more likely to appear, thus law should be prepared to face claims that cannot be fully individualized.

Present paper will not address directly the issue of collective claims arising from environmental damages, but the 'legal accommodation' of collective claims seems important for two reasons. First, parallel developments and solutions can become standards that later apply in various fields (see the concept of 'legal transplants'). Second, specific circumstances can turn environmental protection instruments into minority protection tools, as show the Bikini cases. Minorities that are (either geographically, or in terms of 'effective participation,' or both) far from where the decision is taken, are less capable of protecting themselves against, among others, environmental damages. The Bikini Atoll was a newly acquired territory of the United States, with a small and voiceless population. The fact that they were seen as a weak minority cannot be separated from the decision of carrying out dangerous experiments on their territories. In the actual case, an award was granted to both the individuals and the collectivity.[20]

17 See e.g. the 2001 *Bikini* decision of the Nuclear Claims Tribunal of the Republic of the Marshall Islands, NCT No. 23-04134, p. 39 http://www.bikiniatoll.com/Nuclear%20Claims%20Tribunal%20Dec.pdf (last accessed on 05/06/2009)

18 Available on the site of the UNEP Convention on Biological Diversity: http://www.cbd.int/convention/convention.shtml (last accessed on 05/06/2009)

19 See the document issued by the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety. UNEP/CBD/BS/WG-L&R/4/INF/3, 22 August 2007 http://www.cbd.int/doc/meetings/bs/bswglr-04/information/bswglr-04-inf-03-en.doc (last accessed on 05/06/2009)

20 'The Tribunal has determined that the amount of compensation due to claimants in this case is $563,315,500. This includes $278,000,000 for past and future loss of Bikini Atoll to claimants. It further

It is not by chance that the UN Declaration on the Rights of Indigenous Peoples[21] refers to the protection of environment as a part of indigenous rights, and as an additional guarantee of land rights. While compensations granted to minority groups are often debated, the case for land restitution is even more sensitive, as wide rights over land are closely linked to the idea of territorial autonomy and of sovereignty—in addition to the fact that land is a limited resource, and central to all kinds of nationalism.[22] Present paper will review cases where ownership and other land rights over larger territories are debated, challenging historical 'achievements' (conquests) of the majority state (Chapter 5).

First, I will review the question of material guarantees (property and compensatory claims, Chapter 1) and the issue of collective rights (Chapter 2) in the minority context. Chapter 3 will examine the international documents that might be relevant for collective compensatory claims of minorities, and Chapter 4 will try to sketch a possible classification of the cases that concern our topic outlined above.

includes $251,500,000 to restore Bikini to a safe and productive state. Finally, it includes $33,815,500 for the hardships suffered by the People of Bikini as a result of their relocation attendant to their loss of use.' *Bikini* judgment, p. 45 (Conclusion)

21 See Art. 29-1

22 See the works of Emil Cioran, Janko Janev and Justin Popović to name a few theorists from the South-Eastern European region.

1. Property Rights, Material Guarantees, and Compensations

The right to self-determination—as defined in common Article 1 of the ICCPR and ICESCR—is usually considered as the end of minority rights (in its two senses, as in its 'complete' form it extinguishes the minority status of the entitled group).[23] Accordingly, it can be seen as the maximum of material rights. The second paragraph of the same article—the other regulation that refers to 'all peoples'—explains:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (Article 1-2, ICCPR)

Article 27, in contrast, simply says that states shall not deny certain (cultural, religious, linguistic) rights, but there is no mention of promotion and finance—though assuring cultural and linguistic rights can be very costly—and rights with collective aspects are usually less explicit on the 'resources' and 'means of subsistence' than what we saw in the case of Article 1.

Despite its wording, Article 27 (as it is interpreted) goes beyond the mere obligation of 'self-restraint.' The General Comment No. 23 on Article 27 acknowledges that the very reference to a 'right' means that states should not only refrain from its violation, but should also provide protection against such acts of other persons.[24] The General Comment points out the fundamental differences between the right of self-determination and Article 27, it emphasizes that this latter right 'to enjoy a particular culture—may consist in a way of life

23 Musgrave quotes an Austrian government letter from 1929 that sees an inherent connection between minority rights and self-determination: 'Minority rights, as such, are simply part of and not inconsistent with the so-called right of self-determination of peoples.' The letter argues that minority rights are a form of compensation in the absence of self-determination. Thomas D. Musgrave, *Self-determination and National Minorities* (Oxford: Oxford University Press, 2000), 40

24 General Comment No. 23, 6.1.: General Comment No. 23: The rights of minorities (Art. 27). 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23. (General Comments)

which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.'[25]

Furthermore, as this right may involve protection of distinct ways of life, i.e. land use, fishing, hunting, living in reserves, the right under Article 27 'may require positive legal measures of protection,' and 'positive measures by States may also be necessary to protect the identity of a minority and the rights of its members.'[26] The Comment goes on saying that such measures should be 'based on reasonable and objective criteria' and 'aimed at correcting conditions' of the concerned minority[27], otherwise it would violate the principle of non-discrimination (as defined in Article 26).

The notion of 'corrective conditions' is here a reformulation of *compensation* that can mean compensation for both the present underprivileged status and past injustices (that can result in, again, present disadvantages). This distinction might seem artificial, but the political and legal grounds differ in the two cases (though a combination of the two approach is always possible). In the case of present disadvantages, without examining the past, measures can be part of a general equality policy framework, while in the other case (seeking redress for past injustices) a more specific remedial approach can be applied (e.g. tort law, or material sanctions for criminal liability).[28]

The ICCPR contains a reference to compensation. Its Article 2-3 creates a State Party obligation to provide effective remedy for violations of the rights and freedoms listed in the document, though this applies only to individuals. The Basic Principles and Guidelines on the

25 General Comment No. 23, 3.2. The comment refers here to the *Kitok v Sweden* case: Forty-third Session, Supplement No. 40 (A/43/40), annex VII, sect. G, Communication No. 197/1985 (Kitok v. Sweden), views adopted on 27 July 1988.

26 General Comment No. 23, 7.

27 General Comment No. 23, 6.2.

28 This distinction is different from the question of how much of the two considerations are used in the legitimation of one of the two kinds of measures. Thus arguments based on present disadvantages do not make a compensation 'present-based' if the legal qualification for remedies considers only past facts (proofs of suffered injustices e.g. during mass human rights violations like war).

Right to a Remedy and Reparation[29] provide a broader framework that involves collective compensatory claims as well. Article 13 stipulates: 'In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.'

Tyler Cowen raises serious questions about the grounds of intergenerational claims—a reasoning that touches upon the foundations of collective compensatory logic. It is hard to find a coherent and just logic for individual compensations, a solution for collective measures is an even tougher problem. Counterfactuals—what would the situation be, had the human rights violations not occurred—are indispensable guidelines, but are far from providing a clear path to follow. Cowen argues that given these uncertainties, restitutions should not go too far in time, and should remain relatively small.[30] He notes on the inheritableness of restitutionary claims that they are certainly weaker than property rights, and are more of a question of public policy than of 'automatic legal rights.'[31]

It seems clear that the least contestable means of collective compensation are symbolic acts, and compensations of relatively small amounts (that could also be considered symbolic). But what could we answer to the distinction of policy and legal questions? Where law does not have a solution flowing from its inner logic, principles, or existing rules, it certainly needs an input from public policy. But once this is done, it becomes a legal norm itself, and can be applied with consistency. The goal (public policy consideration) is set in the case of mass violations of human rights. Besides punishment and prevention, in close relation with them, with the general shift towards victims, issues of restitution can be successfully raised. Where

29 Full name: '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,' adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 http://www2.ohchr.org/english/law/remedy.htm (last accessed on 05/27/2009)

30 Tyler Cowen, 'How Far Back Should We Go? Why Restitution Should Be Small,' in *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006), 17-32.

31 Cowen 2006, 26.

individual claims could not cover the return of all the unlawful benefits from the perpetrators and accomplices, collective claims are more than legitimate.

Although the Basic Principles and Guidelines should be applied in a non-discriminatory manner (Article 25), and victims (and their representatives) should get all the relevant information (Article 24; including information on the services available for victims, on the causes and conditions of victimization), no further empowerment of the victimized group (as a group) is prescribed. Effective participation, obligatory participation are not directly linked to the such group, only 'civilian control' over military and security forces is mentioned as an obligatory measure.

The document nevertheless tries to expend its scope by an article completing the 'individualist' definition of victims. According to Article 8, victims also can be those who 'collectively suffered harm'. This may suggest not only to include 'the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization', but members of a wider group as well. The Preamble also recognizes this aspect: 'contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively'.

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[32] follows the track of Article 27 with its exclusive focus on the individual (as the title shows). However, the text—that is not a binding document—gives no real material guarantees for these limited rights: the states should, according to the document, adopt certain measures to achieve or promote the ends set fourth in the

32 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Adopted by General Assembly resolution 47/135 of 18 December 1992

Declaration. The document refers to the right of 'effective participation' that might evolve and become a tool for financial control—but not if the state is stuck to the vague wording of the Declaration. The principle of effective participation should ensure, among others, that the bearers of the costs (taxpayers or otherwise richer regions) have certain control over the spending of the acquired funds—something at stake e.g. in Belgium (with the rupture between the Walloons and the Flemings), or in Bolivia (between the East and the West).[33]

Material guarantees linked to minority rights vary just like minority rights themselves. Kymlicka identifies two experiments of specific minority rights regimes, the rights of indigenous peoples and the European system of national minorities. After the mistrust in the minority discourse (due to the abuse of the inter-war regime by the Nazis), the 1990s brought a change, but international organizations did not follow a universal logic. The struggle for indigenous rights led to some kind of recognition of material guarantees, compensatory claims, and property (or other, mainly land related) rights—that I will review in Chapter 2—while the legislation on national minorities remained very close to the logic of Article 27 of the ICCPR.[34]

The Framework Convention for the Protection of National Minorities, as part of the human rights protection system of the Council of Europe, was adopted in 1995.[35] Accordingly, its basic concept is to ensure equal protection of persons belonging to minority groups. This

33 Similar pattern is followed not only where clear ethnic, national, religious, or linguistic boundaries challenge the idea of a country united in solidarity, but also where such differences are not so clearcut, e.g. in Voivodina where the debates around 'autonomy' were focused on the territorial redistribution of national budgetary funds: while estimates about the national income from the region amount to around 40-45%, the Statute (not yet in force) prescribes that 'The budget of the [Autonomous Province] of Vojvodina shall amount to at least 7% of the budget of the Republic of Serbia.' Article 62 of the Statute of the Autonomous Province of Vojvodina. (adopted by the Province, but not approved so far on the national level) http://www.skupstinavojvodine.sr.gov.yu/dokumenti/PredlogStatutaAPV_ EN.pdf (last accessed on 03/05/2009)

34 Will Kymlicka, *Multicultural Odysseys. Navigating the New International Politics of Diversity* (New York: Oxford University Press, 2007), 35

35 Framework Convention for the Protection of National Minorities, adopted in Strasbourg, February 1, 1995, ETS No. 157.

usually does not go beyond a non-discriminatory approach, e.g. Article 9 on the access to media refers to a 'possibility of creating and using their own media,' but does not deal with the financial part of the issue, though in case of the mass media, this can require vast investments. On the same token, there is only a right to set up minority educational institutions, but there is no mention of how the costs should be covered, unless we consider Article 13-2 as such: 'The exercise of this right [to set up and to manage own educational institutions] shall not entail any financial obligation for the Parties.'

There are of course rights that entail costs to be covered by the home states, such as the right to use one's name, the use of street names, or the right to use the minority language. The use of language before authorities is a separate issue that can create an important financial burden, and the Convention stipulates this right as conditional, both the requirement of 'traditional and substantial numbers' and that of a 'real need' (Article 10-2). It is not clear that the first requirement being fulfilled can nevertheless mean that there is no 'real need.' As the Explanatory Report notes, 'substantial numbers' is a highly flexible term—with its pros and cons. Furthermore, the Article only covers 'administrative authorities,' more important institutions like the judiciary being excluded. Article 10-3 seems to go beyond this restriction with the right to be informed of the reasons of the arrest and of the charges, but this is only a rephrasing of Article 14-3 (a) of the ICCPR.

The Council of Europe adopted a more specific document on linguistic issues, the European Charter for Regional and Minority Languages.[36] Due to its modular system, this is usually only a way to reassure the already existing domestic norms on the international level. But it is exactly language and mother tongue education and media where a kin-state can have

36 European Charter for Regional and Minority Languages, adopted in Strasbourg, on November 5, 1992, ETS No. 148.

important role. The Charter, being aware of this special role and possibility, guarantees[37] the 'freedom of direct reception of radio and television broadcast from neighbouring countries.'[38]

The Oslo Recommendations, on the other hand, say that persons belonging to national minorities 'should have access to broadcast time in their own language on *publicly funded* media,'[39] they talk of a right to 'acquire civil documents and certificates both in the official language […] and in the language of the national minority', though with further limits, and, in addition, the document uses an extremely flexible language ('shall have adequate possibilities to use their language… where they expressed a desire for it and where they are present in significant numbers').[40] This vagueness is present in the wording of the Hague Recommendations, too.[41] This document has nevertheless a special article on the measures and resources enabling the exercise of minority education rights. Though this Article 4 says that states should 'actively implement minority language education rights to the maximum of their available resources,' the Explanatory Notes add that '[a]ltough some rights must be implemented immediately States should strive to achieve, *progressively*, the full realization of minority language education rights' (emphasis added). We should add to all this the fact that these documents are mere recommendations, issued by the Organization for Security and Co-operation in Europe and its High Commissioner on National Minorities.

We can see that minority groups—unless they manage to get into the category of 'indigenous peoples'—have little chance to get support for their material claims based on international documents. We will review the development of indigenous rights, but first, we

37 …provided that the concerned state accepts Article 11-2 of the Charter.

38 The issue of kin-state support—mainly its most inclusive form: granting citizenship—in general is highly contested in present day Europe. The Venice Commission made baseline remarks on this topic in its Report on the Preferential Treatment of National Minorities by their Kin-state. Venice Commission, Strasbourg, October 22, 2001. http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp (last accessed on 05/06/2009)

39 The Oslo Recommendations Regarding the Linguistic Rights of National Minorities and Explanatory Note, OSCE, February 1998. 9 (emphasis added)

40 The Oslo Recommendations, 13 and 14

41 The Hague Recommendations Regarding the Education Rights of National Minorities and Explanatory Report, OSCE, October 1996.

will discuss the case of collective rights, a key element of considering collective compensation as a tool of minority protection.

2. Collectivity, Group… and People

While the existence of collective rights is an extremely controversial issue in the political and academic debates around minority rights, several international documents clearly use this notion. The UN Convention on the Prevention and Punishment of the Crime of Genocide[42] protects groups, collectivity is thus part of its central definition. While individual crimes can only be committed against individuals, the scope of the crimes should go beyond the individual level, and target groups. The International Convention on the Elimination of All Forms of Racial Discrimination[43] put a ban on racial segregation and apartheid,[44] measures that are imaginable only on the group level.

The UNESCO Convention against Discrimination in Education[45] is more explicit on the collective aspects of discrimination, and refers to 'group of persons' as well. However, the most obvious example is common Article 1 of the ICCPR and ICESCR on the 'right of self-determination' of 'peoples.' This right is far from being universal, as most minority groups do not qualify as peoples, thus are not entitled to exercise this right. Collective rights are usually perceived not just as threatening to the state of 'equal citizens,' but also as inherently incompatible with the existence of a liberal state based on individual freedom and equality. In fact, as Iris Marion Young argues, rights are not only consistent with equality, but often prove to be a precondition for full equality.[46]

42 Convention on the Prevention and Punishment of the Crime of Genocide. Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948

43 International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

44 See Article 3

45 Convention against Discrimination in Education. Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960

46 Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship,' in *Theorizing Citizenship*, edited by Ronald Beiner (Albany: State University of New York Press, 1995), 201. Young argues that differentiation is not so much a 'compensation for a certain inferiority' as a compensation for the everyday biases of the majority society (like employers, education).

As Tibor Várady put it, there is no consensus even on whether Article 27 grants collective rights or not, but it is hard to deny that this right has a collective aspect, its full exercise presuppose the existence and recognition of a collectivity.[47] This ambiguity shows the success of the wording, echoed in various other minority rights documents. The main shift in the official treatment of minorities is the move away from assimilationist policies towards acknowledging the continued existence of distinct groups. Thus international documents grant, indirectly, the right to existence to minority groups, without expressed reference to collectivities as the subjects of rights. To reflect this two-folded nature of these rights, Várady uses the term 'group-sensitive rights'—individual rights that presuppose and empower groups.[48]

Kymlicka uses the term 'group-differentiated rights,' but he makes a distinction between those rights that grant *external protection*—from the majority—and those imposing *internal restrictions* on the group members.[49] In this sense, collective compensation could be considered as an *ex post facto* external protection, with the goal to ensure more effective protection in the future.

As for the collective rights of indigenous peoples, the picture is slightly different. Both the ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No. 107[50]) and its revised version from 1989 (ILO Convention No. 169[51]) refer to collective rights. While the earlier,

47 Tibor Várady, 'Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav Case,' *Human Rights Quarterly* 19 (1997): 33-35.

48 *Ibid.*

49 See e.g. Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1996), 35-44.

50 ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. Date of coming into force: 02/06/1959

51 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Date of coming into force: 05/09/1991. This modification was largely motivated by the shame due to the wording of the original convention (No. 107) that sounded largely anachronistic and paternalistic in the changed context of indigenous rights in the '80s.

paternalistic convention applies to 'members' of populations, and goes on to talk about the 'populations concerned,' e.g. its Article 11 talks both of collective and individual ownership rights. The 1989 Convention, on the other hand, applies to 'peoples' (Art. 1; though not peoples in the sense of e.g. Art. 1 of the ICCPR, see Art. 1-3). It is then the UN Declaration on the Rights of Indigenous Peoples—hereinafter referred to as UNDRIP—that talks about the right *to* self-determination of these peoples. (Unlike, again, the common Article 1 of the ICCPR and ICESCR, or the Draft of the UNDRIP, all of which use the term 'right *of* self-determination.') Though legally not binding, it is of primary importance that this declaration uses clear notions of collective rights regarding questions of culture, autonomy, land, and other fields of protection, and its preamble makes it clear that 'indigenous peoples possess collective rights.' But does this include the right of self-determination, and if so, what kind of self-determination: does this entail a material protection (that concern us here)?

Kymlicka explains the different minority aspirations as claims based on Article 1 (i.e. the right of self-determination) that are sought to be fulfilled by rights based on the logic of Article 27 of the ICCPR.[52] While minorities usually see the stronger, collective right as natural and similar to what majority populations exercise in practice, majorities often have fears of this right endangering the very existence of 'their state.' The hidden logic behind these fears is clearly security-based—an approach that excludes the successful accommodation of minority claims.[53] As Judith N. Shklar argues, fear is a strong drive behind constitutional design.[54] Accordingly, it is not simply collective rights that are seen as fearful, the collective facet of

52 Another explanation for the virtual opposition of Article 1 and Article 27 could be that Article 27 as minority right is a compensation where Article 1 cannot apply (see the argument from the Wilsonian concept: minority rights as compensation for the lack of self-determination). A clear proof for the virtuality of this opposition is the case of indigenous rights where references to both rights are made (e.g. in the Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General on the Rights of Indigenous Peoples, Distr. General A/HRC/10/51, 14 January 2009. Human Rights Council, Tenth session, Agenda item 2.)

53 Kymlicka 2007, 118-128

54 Shklar 1989, 29: 'A minimal level of fear is implied in any system of law.'

other rights, like freedom of expression, press, freedom of assembly (freedom of religion being a more contested domain here[55]), while minority rights that—seemingly—question the idea of universal citizenship, endangering the principle of 'same rights for all,' are not accepted as legitimate. The underlying assumption here, rightly challenged by the academic literature, is the idea of a neutral state. Once we acknowledge the more or less obvious biases of the state,[56] the need for group-differentiated rights should also become commonsense where (a) the differentiation is based on relevant biases, and are necessary and proportionate for the goal of assuring equality, moreover where (b) assuring these rights ceased to be seen as security threats to the state.

The more obvious the fact is that a measure targeted a certain collectivity and caused an underprivileged status for that collectivity (collective discrimination), the more legitimate it seems to grant compensation to the same collectivity. This latter means that the compensation entitlement (and the fact that the person suffered harm) is presumed once the belonging is proven. Here lies the central definitional question of collectivity based compensations.

So, again, what does self-determination mean when applied to indigenous peoples? It certainly has a limited sense. This limitation seems to follow the same logic as the US construction of 'domestic dependent nations,' a notion to avoid both the status of a group of undifferentiated citizens and that of a foreign nation. While they are under the roof of the constitution from certain aspects, they hold parts of sovereignty. In the original American context, this meant that while federal regulations apply to the native tribes, they 'do not deserve' the constitutional protection against arbitrary expropriation (needless to say, without fair compensation). As a decision from 1955 stated:

55 The main difference is probably between religions linked to a minority with political aspirations and religions that are 'neutral' in this sense.

56 See e.g. the already mentioned argument by Iris Marion Young saying that equality measures are just 'compensation for the cultural biases of standards and evaluators.' Young 1995, 201.

> 'It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.'[57]

The new setup is a legislative answer to valid jurisprudential considerations (based on ideas of fairness and theoretical coherence) seeking to push the pendulum back to the center.[58] First, we do not need to review the long list of historical events to see that the pendulum never swung towards the extreme of 'overwhelming mass of indigenous rights.' This image is just a reformulation of an old prejudice, i.e. that the majority should be defended from those seeking to tap its funds.

Where measures of collective compensation occur, it is usually an outcome of a complex process. This includes that the internal debates within the concerned group should be considered, thus empowering minority claims and helping to make them explicit. Arguments of solidarity and security are invoked as well as direct references to the type and volume of damages, to their uniqueness, or on the contrary, to parallel events and compensations.

In the case of minority rights, the drive behind these rights is a compensatory logic and, arguably, fear. As Judith N. Shklar puts it: 'Given the inevitability of that inequality of military, police, and persuasive power which is called government, there is evidently always

57 Tee-Hit-Ton Indians v United States [1955] USSC 24; 348 U.S. 272; 75 S.Ct. 313; 99 L.Ed. 314;No. 43 (14 March 1955)

58 See the statement by the Australian prime minister in David Cooper, 'Escaping from the Shadowland: Campaigning for Indigenous Justice in Australia,' *Indigenous Law Bulletin* 20 (2005) http://www.austlii.edu.au/au/journals/ILB/2005/20.html (last accessed on May 27, 2009): 'John Howard's leadership seems to me to embody these 'mean-spirited' values like few before it. It is no surprise that the cause of justice for Australian Indigenous Peoples has gone backwards during his time in office. His approach to Indigenous rights in general is reflected in his comments regarding native title, that 'the pendulum has swung too far in one direction' and needs to be brought 'back to the middle'.' (John Howard, Prime Minister , ABC Television, 4 September 1997)

much to be afraid of.'[59] This is even more true for a society where a clear majority is ethnically distinct, and a political-legal system that leaves a minority in a weaker position (from several aspects).

Article 8 of the UNDRIP is a clear example of how concrete fears based on past experiences motivate the drafters. The clause provides protection against 'forced assimilation' ('imposed' in the draft), deprivation of their integrity, dispossessing them of the resources, forced population transfer, assimilation, or integration.

The International Convention on the Elimination of All Forms of Racial Discrimination from 1965 obliges the state to provide 'effective protection and remedies' for the victims of discrimination. Although the wording refers to individuals, it does not exclude group claims—groups being part of the definition in a negative form: discrimination should be proved to be based on (perceived) group belonging:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. (Article 6)

It follows from this logic that where systematic group-based discrimination exists, collective measures can mean a more effective remedy. Legally this can be a simple alleviation of the burden of proof, founding a claim on membership (of the victim group). As we argued earlier, this serves as the key distinction between individual and collective claims.

The next chapter will review the arguments more closely related to this victim based view.

59 Shklar 1989, 27. She continues with a statement that can be easily applied to minority rights: 'For this liberalism [the 'liberalism of fear'] the basic units of political life are not discursive and reflecting persons, nor friends and enemies, nor patriotic soldier-citizens, nor energetic litigants, but the weak and the powerful.'

4. Victims and Collective Compensation

The Human Rights Committee noted interpreting the State obligations included in the ICCPR:

> 'Article 2, paragraph 3 [of the ICCPR], requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy… is not discharged. … The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.'[60]

Most of minority rights are as strong as the financial means supporting them. On the negative side, the severity of sanctions can be measured by the potential personal and material wrong linked to the act in a legal procedure. Conceptions of environmental protection include the 'internalization' of the costs of pollution, thus charging the polluter with all the costs of its activity, that otherwise would count as externalities. To sum up the argument, we can assume that the more efficient the sanction is, the stronger the legal protection. We saw that the International Convention on the Elimination of All Forms of Racial Discrimination obliges the member states to assure effective protection against the violations of the rights set forth in the Convention (see Article 6).

As Chris Chapman puts it: 'Where minority rights arguments have been used with more frequency in transitional justice situations is with regard to reparation claims, and demands for legal, political and social reforms to ensure that massive and systematic abuses do not reoccur.'[61]

The right of victims to redress, remedy, reparation, or compensation is a fundamental right under international law. And this provides protection not just for the injuries caused by

60 Article 16 of the General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant. 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments) Human Rights Committee

61 Chris Chapman, Transitional Justice and the Rights of Minorities and Indigenous Peoples, International Center for Transitional Justice, 2008 (draft), p. 4

states or state agents, but all kinds of human rights violations.[62] Legal experts developed a coherent framework for the application of this right. (The scope of this obligation was further analyzed in the debate on the 'responsibility to protect.'[63]) This aim is part of a larger project, including the creation of a permanent International Criminal Court,[64] that shall make the universal struggle against gross human rights violations more systematic. The aim of this 'coherency' is clear: to depoliticize decisions that are otherwise politically very sensitive. Responsibility e.g. for inter-state or civil wars is usually highly contested, and 'justice' is supposed to be made afterwards along political lines. Once an international body with a coherent framework (clear list of crimes and precedents) is set up, one expects the decisions to be distanced from clear political considerations.

Collective compensation for minorities is a similar, sensitive issue. One can consider that 'minority rights … constitute a form of compensation offered to the minority by reason of the fact that the latter could not be granted or has not been granted the right to self-determination.'[65] This way we see minorities as the victims of the existing state system, of past international–political decisions.

But empowering minorities that were victims of past injuries can be contested also by referring to the past: other injustices for which the very same minority is held responsible; or by present considerations, contesting the empowerment or (the support for) minorities in the

62 See Articles 6-7 of the General Comment 31. General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant. 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments)

63 The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty, December 2001. http://www.iciss.ca/report2-en.asp (last accessed on May 26, 2009)

64 Rome Statute of the International Criminal Court. A/CONF.183/9 of 17 July 1998, entered into force on 1 July 2002. http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf (last accessed on May 12, 2009)

65 Protection of Linguistic, Racial or Religious Minorities by the League of Nations: Resolutions and Extracts from the Minutes of the Council, resolutions and Reports adopted by the Assembly, relating to the Procedure to be followed in the Questions concerning the Protection of Minorities, League of Nations Doc C. 8 M.5 1931 I [B] at 43 (1931), quoted in Stefania Errico and Barbara Ann Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sámi People,' in *Reparations for Indigenous Peoples. International and Comparative Perspectives,'* edited by Federico Lenzerini (New York: Oxford University Press, 2008), 365

actual context. However, once the decision is based on a limited set of conditions (type of injury, damage and responsibility, adequacy of the compensatory measures), political factors can be limited.

As Sajó puts it, after a period where reference to past injustices was not a 'constitutional fashion,' more and more constitutions from recent times expressly mention historical grievances.[66] Thus constitutions set up a historical frame—a choice from the available interpretations of the history of the country—and the constitution becomes a remedial act in itself, remembering families, tribes, populations, nations.[67]

The European Constitution interprets the union as an answer to 'bitter experiences.'[68] The preamble of the Constitution of South Africa is probably a paradigmatic case for historical foundation: 'We, the people of South Africa, recognize the injustices of our past; honor those who suffered for justice and freedom in our land…'[69]

The UN Declaration on the Rights of Indigenous Peoples refers several times to past injustices. The Preamble of the final version mentions that indigenous peoples 'suffered historic injustices' that is a somewhat milder rephrasing of what the original draft said: they 'have been deprived of their human rights and fundamental freedoms.'[70]

66 András Sajó, 'Shame: On Hidden Constitutional Sentiments,' in *Emotion and Reason in Constitutional Law. Reader for the CEU Legal Studies Department, 2008/2009.* (article to be published in the author's forthcoming book as chapter 8), 17

67 'Remembrance in this sense is equally important to communities—families, tribes, nations, parties—that is, to human entities that exist often for much longer than individual men and women. To neglect the historical record is to do violence to this identity and thus to the community that it sustains. And since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting individuals as well.' Jeremy Waldron, 'Superseding Historical Injustice,' *Ethics* 103, no. 1 (October 1992): 4-28, 6. Quoted by Sajó 2009, 17

68 Treaty establishing a Constitution for Europe, Preamble, 2004/C 310/01. *Official Journal of the European Union*, 16.12.2004

69 Constitution of the Republic of South Africa, 1996, Preamble. http://www.info.gov.za/documents/constitution/1996/96preamble.htm (last accessed on May 27, 2009)

70 Draft United Nations declaration on the rights of indigenous peoples (1994/45.) http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En and United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007. http://www.un.org/esa/socdev/unpfii/en/drip.html (last accessed on May 27, 2009)

In all cases, the recognition of the rights of victims is of primary importance, and it is essential for considering compensatory claims. As Carla Ferstman notes, the ICC and the Rome Statute made important steps toward recognizing the rights of victims.[71]

The Human Rights Committee notes that 'cessation of an ongoing violation is an essential element of the right to an effective remedy,'[72] and the inverse of this statement is accordingly true: an effective remedy is essential in the fight against right violations. Theo van Boven, the Dutch jurists, then the UN's Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, developed legal principles on remedies and reparations with the above considerations. These rules were later discussed as the 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, and were adopted by the General Assembly of the United Nations in 2006.[73] This document refers to victims as those 'persons who individually or *collectively suffered* harm, including physical or mental injury, emotional suffering, *economic loss* or substantial impairment of their fundamental rights…'[74] Taking this example, even if a collective compensation is granted to a group, from the perspective of the concerned, the central question remains whether the state is willing to accommodate diversity in the long run, or just fulfilled its perceived duty of doing one-time justice. The preamble of the document notes that 'contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively.'

71 Carla Ferstman, 'The right to reparation at the International Criminal Court,' *article 2*. December 2002 Vol. 1, No. 6, p. 22 (can be downloaded from http://www.article2.org/pdf/v01n06.pdf, last accessed on May 13, 2009)

72 Article 15, General Comment No. 31: General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant. 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comments)

73 General Assembly resolution A/RES/60/147, 21 March 2006.

74 V. Victims of gross violations of international human rights law and serious violations of international humanitarian law, Article 8.

The General Comment No. 31 in its Article 9, is more cautious, but while the Human Rights Committee—for procedural reasons—excludes the possibility of admitting collective claims, it leaves open the theoretical possibility of such references:

'The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention he rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (Article 18), the freedom of association (Article 22) or the rights of members of minorities (Article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.'

Article 25 of the Draft Declaration (adopted in 1993) refers to distinctive spiritual *and material* relationship with lands, while the finally adopted (in 2007) form does not contain the term 'material.' This suggests that the right to maintain this relationship does not entail actual change in the status (ownership) of the land. Article 26 goes further in details. In the draft version, it reads as follows:

> 'Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions, and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.'

In the final wording, this is a simple 'right to the lands, territories and resources,' and the state obligation to 'give legal recognition and protection' to them. The only reference to ownership

is in the case of actual possession, thus without the duty to undo injustices in practice.[75] Accordingly, Article 28 of the final text erased the 'right to restitution' (Art. 27 in the Draft) and created a simple possibility ('that can include restitution.') The same goes for the next article, on the right to the conservation and protection of the environment…, with the missing *right to its restoration*. So basically giving back lands became a simple possibility, and alternative compensations are allowed in most of the cases.

As we saw earlier, in the Introduction, the literature tends to deal with collective issues as a procedural question. In Dinah Shelton's book on remedies, group claims are presented under the heading 'Procedural Issues,' while references are made to texts recognizing collectivities (like the ILO Convention No. 169, or the Genocide Convention).

What seems clear is that once we find a firmly definable victim group, collective measures are legitimate, and can sometimes be directly litigated, further questions usually concern adequacy and efficiency.

We will review the situation of Sami land rights in Norway and Sweden in Sub-chapter 5.2, but a quote on Sami rights belongs to here. We emphasized earlier the shift from assimilationist policies to the gradual acceptance of group-differentiation. The delegate of Sweden before the Committee on Economic, Social and Cultural Rights denied both 'group' and 'differentiation' concerning the legal assistance to raise Sami land claims—an essential part of remedial rights. They answered to a question from the Committee that 'each Sami was entitled to the same legal aid benefits as any other person entitled to rights in Sweden, however, a Sami community as a whole could not apply for legal aid.'[76]

75 Article 29 of the draft also included the notion of ownership: 'Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.' But all that remained is the 'right to maintain, control, protect and develop their cultural heritage' and intellectual property. (Article 31 of the final text)

76 Committee on Economic, Social and Cultural Rights Press Release on the Examination of the Report of Sweden, 6 November 2008 http://www.unhchr.ch/huricane/huricane.nsf/view01/E722E65B9BA1809FC12574F9004C7B99?opendocument (last accessed on May 24, 2009)

4. Classification

In the present chapter, we will review the possible grounds for classification of compensatory claims and measures, including the subjects, the objects, the grounds, and the method of the compensation.[77]

The main distinction as for the subjects of collective compensation is whether there is a preexisting body that can be recognized as the holder of compensatory claims in the proceedings, or there is need for establishing a procedural personality for this aim.

The 'original actors' in international law are states—that can be considered as preexisting bodies, even in case they did not exist while the human rights violations occurred (as we will see later). Probably the least problematic case for collective compensation (as for the subjects!) is where the group of victims and the responsible group can be paralleled to states. Their legal personality under international law (once recognized) cannot be questioned. The problem in this case is the analogy itself: to what extent the *actual* group of perpetrators and that of victims are equal to the leaders and population of the countries?

A good example for this is the claim of Bosnia and Herzegovina before the International Court of Justice, against Serbia and Montenegro (then Federal Republic of Yugoslavia, later only Serbia).[78] In the final point of a long list, Bosnia claimed that:

> 'Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court.'[79]

77 For a more structured overview of the main aspects, see Table 1 in the Annex.
78 See the judgment of 26 February 2007, General List No. 91. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) http://www.icj-cij.org/docket/files/91/13685.pdf (last accessed on May 19, 2009)
79 *Id*. p. 19, 64 (r)

As the claims were based on alleged acts of genocide, collectivity had two aspects in this case. On the side of the perpetrators, the chain of command had to be proven, the order of the political leaders establishing the responsibility of the state. In addition to this, the intention, not just the mass killings had to be proven. The International Criminal Tribunal for the former Yugoslavia[80] held that the Srebrenica massacre qualifies as genocide under international law,[81] and the ICJ concurred with this statement, declaring that there were actual 'acts of genocide.' The judgment held that though Serbia did not commit or conspired to commit genocide 'through its organs or persons,' nor was a complicit in genocide, but violated its obligation to prevent genocide.[82]

The Court remained to judge the claim for compensation, once a violation had been found. The majority found that compensation in this case was not an appropriate form of reparation. It is clear that restitution—*restitutio in integrum*—is not possible. Furthermore, the Court held that a causal link cannot be established between the damage and the found violation:

> It 'does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.' … 'the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.'

80 Full name: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

81 See e.g. the judgment in the case Prosecutor v. Radislav Krstić, ICTY IT-98-33-A of 19 April 2004. http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf (last accessed on May 12, 2009)

82 See XII. 471. (2)-(5): 13 votes to 2 on 'not committed genocide' and 'not conspired to commit genocide.' 11 to 4 on 'Serbia has not been complicit in genocide,' and 12 to 3 on 'Serbia has violated the obligation to prevent genocide.' p. 168-169

While we saw the main concerns with the idea of state responsibility (as a case here for collective compensation), collective compensation concerning other collectivities is usually far more contested. One solution is to find a preexisting legal personality 'close' to the group of victims, like a church, or some kind of self-government. From a theoretical point of view, we should distinguish the case of compensations granted to churches for damages suffered as churches, and the cases—that concern us here—where there is a mass violation of human rights concerning a group of people based on their religious belonging, or other (perceived or actual[83] ethnic, national, linguistic) belonging that overlaps with this parochial belonging.

A case for a preexisting collectivity—that is later recognized as holder of (compensatory) rights in the proceedings—can be the collective claims raised by tribes before the Inter-American Court of Human Rights. In the case of the *Plan de Sánchez Massacre v. Guatemala,*[84] human rights violations included crimes that could only be compensated for via collective measures. Through systematic killings, rapes, and ongoing oppression, it was not only the individual victims who suffered, but the collectivity got into danger. The continuity of their common heritage, of their traditions, religious practices was at risk, and partly vanished as the older people were murdered by members of the Guatemalan Army and its civilian collaborators. Accordingly, compensation[85] had to include collective aspects.

The way the Court dealt with the collective personality is probably closest to the class action type litigation. Article 48 of the judgment refers to victims as those listed in a separate document—issued by the Inter-American Commission on Human Rights—plus 'those that may subsequently be identified, since the complexities and difficulties faced in identifying them lead to the presumption that there may be victims yet to be identified.' This implies the

83 Meaning self-identification here, *and* (/*or?*) recognition by the group.
84 Case of the Plan de Sánchez Massacre v. Guatemala. Judgment of April 29, 2004. Series C No. 105, Inter-American Court of Human Rights.
85 Case of the Plan de Sánchez Massacre v. Guatemala. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, Inter-American Court of Human Rights.

application of an automatic system of identifying members of the victim community as individual victims themselves, but nevertheless refers to an individual understanding of the claims. Surviving victims where thus individually identified and named in the decision (and each granted a USD 5.000 + 20.000 amount for pecuniary and non-pecuniary compensation). The Court, while noting that this individualization seemed necessary, reserved 'the possibility to determine, in the corresponding section, other forms of reparation in favor of all the members of the communities affected by the facts of the case.'[86] And, accordingly, Articles 93-111 enumerates state obligations that qualify as means of collective compensation. This includes (a) the obligation to investigate the facts of the massacre (Articles 94-99), (b) the public acknowledgement of state responsibility (for reparation and commemoration, Articles 100-101), (c) the translation of both the underlying Convention and the concerning judgments into the Maya-Achí language (Article 102), (d) the publication of certain parts of the judgments (in the official gazette and a daily newspaper with national circulation (both in Spanish and Maya-Achí, Article 103), (e) the creation and funding of a commemorating chapel (as a 'guarantee of non-repetition,' Article 104), (f) setting up and funding a committee evaluating the physical and mental condition of the victims, and providing health care, specialized programs for them free of charge (Articles 106-108), (g) implementing a housing program for the victims within five years (Article 105), and (h) a development program in areas of 'health, education, production and infrastructure,' including road system, water supply, schooling, and health center (Articles 109-110). The judgment ordered the implementation within five year, and Guatemala should send a report each year on the progress.

86 Article 62 of the Judgment of November 19, 2004. Series C No. 116, Inter-American Court of Human Rights. (on Reparations and Costs)

This case leads us to the case where there is no trace of a preexisting body, collectivity that could be recognized as holding an appropriate legal personality. Here we could mention the Jewish Conference on Jewish Material Claims Against Germany[87] that was founded for the purpose of raising a wide range of compensatory claims. This includes individual and collective claims, claims enforced by political, diplomatic, or judicial means. Accordingly, the assets are used and allocated following separate logics (pensions, regional considerations on the territory of the former Soviet block, hardship fund, 'victim type' based allocations: for victims of slavery or forced labor, victims of medical experiments etc.).[88] The organization functions based on a tripartite agreement—paradoxically, while the claims concern damages occurred during the Second World War, none of the three parties existed during or before the war: Israel, West-Germany, and the Claims Conference. As a result of this agreement, the legal personality of the organization is assured, both from the external side, and the internal relations between the Conference and the victims.

The case of the Claims Conference brings up several issues that we will not consider in details here, but it seems useful to review the different aspects of collective compensatory claims. We saw a few cases how the law can deal with collective subjects of compensation. Such plans can include individual claims as well—on a voluntary basis: victims should always have the right to opt out, and choose the complete individualization of their claims, if that is feasible—but collective measures provide unique solutions for cases where claims

87 In 1951 'Dr. Nahum Goldmann, co-chairman of the Jewish Agency and president of the World Jewish Congress, convened a meeting in New York City of 23 major Jewish national and international organizations. The participants made clear that these talks were to be limited to discussion of material claims, and thus the organization that emerged from the meeting was called the Conference on Jewish Material Claims Against Germany—the Claims Conference. The Board of Directors of the new Conference consisted of groups that took part in its formation, with each member agency designating two members to the Board. The Claims Conference had the task of negotiating with the German government a program of indemnification for the material damages to Jewish individuals and to the Jewish people caused by Germany through the Holocaust.' History of the Claims Conference. http://www.claimscon.org/index.asp?url=history (last accessed on May 12, 2009)

88 See the list of programs of the Claims Conference: http://www.claimscon.org/index.asp?url=compensation (last accessed on May 12, 2009)

cannot be fully individualized. A typical hard case for individualization is inheritance where the descendants' (or other heirs') right to compensation is not acknowledged as directly flowing from the (deceased) victim. In this case, descendants can either represent their claims based on their loss of family member, or try to find other ways to litigate the original claim as descendants. Once the direct link vanishes, or is not recognized by the relevant legal system, membership based claims can be raised.

In case of a 'collective victim,' a 'collective subject of compensation,' and if there is no preexisting body that could be recognized as having an adequate legal personality, the challenge for decision-makers is to model a complex internal relationship and the external constitutional prescriptions, while mirroring the reasons of the compensations (reflecting the type and volume of damages, of past injustices).

Complex compensatory systems were set up in the case of post-communist countries, including claims from both under the Second World War and the communist era. In the case of Hungary, the budgetary limitations of the state meant the frames of the compensations, creating a collectivity, in this aspect, of the victims of discriminatory and other unlawful state acts from 1939 to 1949. (While the compensation here created a distinct legal ground for claims, the decisions were made on an individual basis, through a valorizing system.)[89]

While, in the Hungarian case, for simple reasons of feasibility, as several potential claimants could request the same land or house due to multiple waves of confiscations, the compensation *in rem* was not an option, compensation can include rights over real estate. The most plastic examples are probably the indigenous land claims that challenged the legal setup

89 See Articles 1, 2 (entitlements), 3 and 4 (amount) of the original Act No. 25 of 1991 on partial compensation, in the interest of settling ownership, for damages unlawfully caused by the State. On the conformity of these measures to international human rights norms, see the reasoning in *Ivan Somers v. Hungary*, Communication No. 566/1993, U.N. Doc. CCPR/C/53/D/566/1993 (1996), finding that the voucher system is 'both objective and reasonable,' and it 'provides for compensation on equal terms.' (9.6 and 9.7) On the question of constitutionality and dogmatics, see László Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (Budapest: Osiris, 2001), 615-623.

based on colonization, nation-building, an official and long tradition of discrimination. We will continue by reviewing two set of cases of indigenous land claims, first the post-Mabo Australian situation, then the Sami struggle for land rights.

5. Case Studies

Minority land and restitutionary claims can find the most international support (i.e. supporting legal principles) if presented as *indigenous* claims. The very term and meaning of indigenous peoples is debated.[90] Minority groups seek recognition as indigenous peoples to benefit from the rights linked to this status.[91] This might even endanger the concept of a distinct (and stronger) branch of minority rights under the idea of indigeneity.[92]

As Ivison rightly notes, law is part of a larger competition of discourses and interests, with the majority view, the heritage of the colonization, leading, while a counter-discourse of indigeneity is also gaining power.[93] This latter can now build on a global discourse on indigenous rights that involves the diversity argument on 'traditional cultures in danger,' linked to the richness of the world; the poverty arguments (present in World Bank documents) on groups of seriously underprivileged people; in all cases we find references to the injustices of the past that continue to have effects in today's societies; additional discourses connect support for 'the indigenous case' with environmental issues, anti-military and anti-violence movements, global actions for a peaceful and harmonious world etc. All this to counter the long term effects of colonization and nation-building, taking lands based on ideas of cultural hierarchy ('it is more useful if these lands are in our hands'), a racist stance at its roots. Such

90 For a general discussion, see Gudmundur Alfredsson, 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law,' in *Minorities, Peoples and Self-Determination. Essays in Honour of Patrick Thornberry*, edited by Nazila Ghanea and Alexandra Xanthaki (Leiden and Boston: Martinus Nijhoff Publishers, 2005), 163-172. or: Aoife Duffy, 'Indigenous Peoples' Land Rights: Developing a Sui Generis Approach to Ownership and Restitution,' *International Journal on Minority and Group Rights* 15 (2008): 505–538.

91 The question of being recognized as indigenous should be separated here from the question whether these groups should be considered as one or several 'peoples.' In the Aboriginal case, around 400 distinct groups can be identified in Australia, while the Sami are usually considered as one people despite the fact that they live in four countries.

92 Kymlicka 2007, 285-287

93 Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002), 140

ideas survived after the abolition of slavery, and caused serious and actual deprivations of basic rights and of the basic means of subsistence.

We will deal with two specific cases in this paper, the Australian Aboriginals and the Sami. Aboriginals comply with all the requirements and these groups can be regarded as *par excellence* cases of indigenous peoples (or: rather grounds for comparison than those compared), with a special attachment to (home)land, underprivileged in contrast with the majority, with a precolonial history of land use, colonial history of sufferings, and post-colonial struggle for rights.

The Sami, on the other hand, were not colonized in the strict sense of the term, though other elements of a possible definition certainly apply to them as well, mainly in connection with their special relationship to land use, and injustices suffered during the nation-building efforts of the majority societies.

In both cases, the original idea was a *de facto*—in the Australian case, also *de iure*—concept of *terra nullius*, as if nobody lived on the occupied territories, or at least nobody who deserved protection.[94]

Indigenous rights touch upon a variety of topics: effective participation, poverty, classical equality measures—and land rights. While these areas are seen more and more as a valid concern for international organizations—see the latest UN Report on indigenous rights[95]—it is still national bodies that play the central role in this game: the legislation and the judiciary.

94 This reminds me of the warning of Švejk who starts shouting in the war when the enemy starts to shoot at his platoon: 'Stop this, can you hear me? There are people here!' [Karel Steklý: Dobrý voják Švejk (The Good Soldier Schweik), 1957. A movie based on the novel by Jaroslav Hašek.] It was the judiciary in both cases that warned the legislation: there are people holding rights on those lands.

95 Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General on the Rights of Indigenous Peoples, Distr. General A/HRC/10/51, 14 January 2009. Human Rights Council, Tenth session, Agenda item 2.

In the present chapter, we will review two cases that seek to exemplify the complex relationship between the judiciary and the legislation in the struggle for indigenous land rights. The overview will also show that the actual outcome, the effect on indigenous peoples will always depend on the realization that again depend on the existing legal, political and social circumstances. Thus international norms, though can be important, are not likely to be decisive 'on the ground.'

Let us now see how different indigenous populations struggle for a kind of self-determination under the umbrella of the constitutional regime of the country where their traditional lands are.

5.1. Australian Aboriginal Native Land Title

The legislature of Queensland, Australia adopted in 1985 the Queensland Coast Islands Declaratory Act.[96] It was declaratory because it wanted to remove 'any doubt' about the legislative power over certain islands that were annexed to Queensland in the nineteenth century.[97] What the Act did in fact was to extinguish all those rights over these territories that may have otherwise survived the annexation in 1879. The aim of this step was to make a clear situation as for the status of these lands—concerning the native titles, the traditional legal rights of the indigenous population, that might still exist.[98] Furthermore, Section 5 of the Act provides that 'no compensation' is payable to holders of 'alleged' rights in connection with the annexation.

As Justice Brennan put it in the decision of historical importance, if a native title could avoid the Scylla of the 1879 annexation, it risks to fall under the Charybdis of the extinction in 1985.[99]

Eddie Mabo, a Torres Strait Islander,[100] filed a claim based on his commitment that the Crown never held property rights over his home island of Mer (also known as Murray Island, a small island in the Torres Strait, the strait between Australia and Papua New Guinea). The claim referred to the Racial Discrimination Act of 1975 (hereinafter: RDA). The Australia Constitution does not include a Bill of Rights—it follows an institutional logic, though refers to the right to just compensation e.g.[101]—but the RDA provides a general anti-discrimination framework. This is why the High Court of Australia could only quote Article 17 of the

96 Queensland Coast Islands Declaratory Act 1985, No. 27
97 See Sections 3, 4 and 5 of the Act.
98 See the reference to the Minister's speech in Section 11 of the majority opinion by Brennan, Toohey and Gaudron JJ. in the the Mabo case: Mabo v Queensland (No 2) ('Mabo case') [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)
99 See Article 72 of the decision by Bennan J. in the Mabo case.
100 Indigenous peoples in Australia are recognized as Aboriginals or Torres Strait Islanders.
101 See Paragraph 51(xxxi) of the Commonwealth of Australia Constitution Act 1900 (1900 c. 12 63_and_64_Vict)

Universal Declaration of Human Rights 1948 as a valid formulation of the right to property—a right thus protected in the understanding of the RDA.

But this argument seems just a 'replacement' for self-determination, sovereignty-based considerations. As in the case of the application of Article 27 of the ICCPR,[102] the discriminatory effect of these land acquisitions—together with the common law notion of 'native land title'—was the available legal norm supporting the case for indigenous land rights.

But what is important from a strict legal point of view is that the relevant provisions of the Queensland Coast Islands Declaratory Act were found inconsistent with the universal anti-discrimination clause and were held invalid by this reason. The Court found that the Act clearly discriminated against the Miriam people (inhabitants of the Murray Islands).[103]

As noted earlier, the Act sought to extinguish all rights that might have existed when the law was passed. The Court in this decision did not address the question whether the native title in question had been extinguished before the Act or not. This was left to the second *Mabo* case—*Mabo v Queensland* (No 2)—that was decided a few years later, in 1992, and provoked direct legislative response, its effects lasting today. As former Chief Justice Sir Harry Gibbs put it: 'few, if any, [decisions] have given rise to such a diversity of responses, ranging from euphoria to deep anxiety.'[104]

The seven judges of the High Court of Australia brought five different judgments, and they were deeply divided in several questions. The first main decision touched upon the common law notion of 'native title.' The majority of six to one decided that this title is recognized by the common law of Australia, and it means an entitlement of the indigenous

102 See e.g. the *Lovelace v. Canada* case: Sandra Lovelace v. Canada, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

103 Section 21 of the majority opinion by Brennan, Toohey and Gaudron JJ.

104 Sir Harry Gibbs, 'Foreword' in Margaret Stephenson and Suri Ratnapala (eds), Mabo: A Judicial Revolution (1993) xiii, xiii. Quoted by Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act.' *Melbourne University Law Review* 27 (August, 2003): 526-538. II. The Promise of *Mabo*: the High Court's 'Great Leap Forward'

peoples in accordance to their own laws and customs.[105] Thus in the limited area where the majority law enables (i.e. this title has not been extinguished), land rights are acknowledged as they exist in minority laws. This is a great step forward, as it was generally considered that no such thing as native title existed—or survived the British colonization with its acts of sovereignty.[106]

But what is the limited area where this title seemed to have survived? The Court held unanimously that the Crown, upon settlement, acquired radical title that could extinguish native title, and this cannot be questioned by courts, being a question of sovereignty.

As Justice Brennan argues, the Court cannot question the grant of the sovereign (the Crown), and the Crown itself is bound by the grants once made. Native title does not hold this kind of validity, it does not have this sovereign source, thus can be extinguished by grants. (This interpretation is convincingly questioned by McNeil who invokes the British example where common law land titles never required to be originated from the Crown, but could not be questioned on such grounds.[107]) Such grants should nevertheless be clear and exact, with a clear and plain intention to extinguish native title. This is true for grants that are inconsistent with native titles.[108]

Outside of this limited field where native title survived, the question of compensation arises. The Court decided by a majority of four to three that the Court can force no compensation in case of an act of the sovereign.

Despite this limited scope, the recognition of a surviving and, between these boundaries, enforceable native title stirred up public sentiments and raised fears—that were translated into legislative answer in a couple of months. The Native Title Act was adopted in 1993 (under

105 See Article 2 in the judgment by Mason C.J. and McHugh J. or Article 64 in the judgment by Brennan J.
106 Tehan 2003, II. A. Before *Mabo*: The Common Law.
107 Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada.' *Osgoode Hall Law Journal* 42 (2004): 7.
108 See Articles 74-75 in the judgment by Brennan J.

No. 110), and wished to regulate the 'unstable situation' that (arguably enough) followed from the Mabo decision.

The adoption of RDA created a legal principle that should be respected in consequent legislative acts. The Court found an inherent compatibility between the concept of *terra nullius* and the clause of non-discrimination. Following the decision, it was again the turn of the legislation in the interplay between these two branches of power.

The Native Title Act[109] was an outcome of opposing interests, fears, and considerations. It recognized native title and gave legislative content and limits to it. To serve stability, it recognized post-1975 grants that would otherwise violate the RDA (so severely as to lead to their invalidity), and required compensation for such acts.[110] For future resolutions, the National Native Title Tribunal was established, but this authority became a mere mediative body, its procedures often locked by the amount of opposing interests or by the gap between the opposing sides. The complexity can be seen if we consider that inter-indigenous debates over titles could also easily occur.

While the application of the Act was in process, a new government (with the prime minister John Howard) came into power. They presented plans to amend the existing legislation dealing with native title claims, but these were triggered by the *Wik* decision of 1996. This decision (with a majority of four to three) held that native title could survive grants of pastoral lease (agreements to ease the share of Crown lands for farmers). Though the Court also held that where the two titles were inconsistent, the pastoral lease extinguished native title, the possibility that native title could still exist over wide areas in Australia raised serious concerns. The legislative answer, accordingly, was directed toward limiting native land title. The Native Title Amendment Bill of 1997 was vehemently opposed by indigenous

109 Native Title Act of 1993
110 Tehan 2003, IV. B. Validation and the *RDA*

representatives who expressed that they neither were consulted nor consented to it. The Act thus seemed to 'extinguish trust' in the process of a possible agreement between those fighting for the wider recognition of native title and those opposing it.[111] The application depended again on the judiciary, and three cases[112] marked an important turn here: having an Act defining and regulating native title, the common law concept, the original source and reference became almost insignificant.

The judiciary started to apply the restrictive rules of the legislation, not lamenting on the principles shaped by the original decisions any more. While the first step, the adoption of the RDA came from the legislation, and the 'final' word so far is that of the judiciary, the responsibility for playing away the chance for a historical agreement lies within the legislation.

We should note, after all, that indigenous land rights are often protected only as accessories of exotic and ancient traditions (if at all), and remain directly linked to them, in a way 'sharing their faith.' As Court found in the Mabo decision, these rights are recognized within the framework of a traditional system of law and customs. Once this framework collapses—e.g. by forced removal, by the abandonment of the relevant traditions—the common law ceases to protect the native title.[113] Compensation here, as for mere judicial considerations, has no legal grounds.

While the High Court of Australia recognized the particularity of native title (or: the special relationship of indigenous peoples to their ancestral land), it created a cage out of this framework. Once indigenous peoples escape, they risk to loose their lands. (This 'cultural

111 Tehan 2003, V. The Allure of 'Certainty': *Wik*, the Ten Point Plan and the *Native Title Amendment Act 1998* (CTH)

112 Cases of the High Court of Australia: *Western Australia v Ward* (2000) 170 ALR 159 (‘*Ward*’), *Wilson v Anderson* (2002) 190 ALR 313, and *Yorta Yorta v Victoria*: Members of the Yorta Yorta Aboriginal Community v The State of Victoria (2002) HCA 58 (12 December 2002). See Tehan 2003, VI. 'Remnant Lands, Remnant Rights': The Recent High Court Decisions

113 See the decision by J. Brennan in the *Mabo* case: 66-68.

basement' of minority rights protection goes back to the Human Rights Committee decision in the *Lovelace v Canada* case, based on Article 27 of the ICCPR.)

As Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner put it: 'Only traditional laws and customs of Indigenous peoples that existed at the time of sovereignty and which are still observed and practiced today will be recognised. There is little room for adaptation of the traditions to today.'[114] When indigenous peoples could and would use their resources for direct economic and social purposes, or adapt to their present needs and status, they may risk the very existence of their land title. This, together with the general weakness of native title—as Calma noted: 'Native title is at the bottom of the hierarchy of proprietary rights in Australia'—makes indigenous land rights extremely vulnerable.

It seems unreal to think that international norms could address issues so deeply linked to sovereignty as land titles acquired or extinguished during past colonization or nation-building.

Tom Calma—a specialist of indigenous affairs for over 35 years—reviewed the possible fields for advancing minority (or, more specifically, indigenous) rights, and he included several measures based on past injustices. He started with the official recognition of such rights, setting this issue as a priority for the government. This should go hand in hand with the 'acknowledgement of and compensation for past injustices as the basis for genuine reconciliation and co-existence.' This should mean, in practice, restitution, or, if that is not possible any more, compensation for lost lands and for the damages caused to the integrity of indigenous societies. Then Calma added the tasks that form an integral part of a general equality policy plan: legal measures, education, training, and other public information

114 Tom Calma. 'Indigenous Issues in the Durban Review.' Castan Centre Public Forum: 'Can the UN Combat Racism.' A preview of the Durban Review Conference. Melbourne, 20 February 2009. http://www.hreoc.gov.au/about/media/speeches/race/2009/20090220_Durban_Review.html (last accessed on May 20, 2009)

programs to counter prejudice and discrimination, and, last but not least, 'adequate funding and resources to overcome indigenous social and economic disadvantage.'[115]

Let us now turn to the principles and considerations that led to the judicial recognition of native title. As McNeil suggests, judges are reluctant to refer expressly to economic and social consequences as foundation of their decisions.[116] Still, the Mabo case suggests that the actual outcome drew a thin line both to recognize indigenous land claims and to avoid the infringement on (clearly defined and identifiable) third party interests that might exist. As McNeil put it, social reality is a constraint that, regardless of legal principles, will always determine the possible outcome of indigenous claims brought before court.[117]

As for the actual outcome, Tom Calma—special commissioner of Australian indigenous affairs—summarizes the recent 'developments' as the strict and inflexible limitation of the recognition of native title.[118] He identifies several key areas, but the central issue is a simple procedural question, that of the burden of proof. The courts require proof for a continued and actual exercise of traditional law and customs. This implies that the more an indigenous population was exposed to the effects of colonization, the less likely it is for them to make successful claims for their lands. Let us consider that these cultures are based on the oral transmission of knowledge, and it becomes clear how discriminatory this seemingly neutral principle is.

In the next section, we will see a case where some courts acknowledged this fundamental bias of the legal system (as one of the institutions of the majority), and adjusted the application of procedural rules accordingly—for the greater benefit of indigenous rights in Europe.

115 *Ibid.*
116 McNeil 2004, 40
117 McNeil 2004, 47
118 Calma 2009

5.2. Sami Land Claims

The Sami—also Saami, or Sámi (formerly: Lapp)—are a people in Northern Europe. Most of them live in Norway and in Sweden, but they are also present in Finland and in Russia. They are recognized as an indigenous people,[119] like the Aboriginal peoples and the Torres Strait Islanders, with similar difficulties as for the recognition of their land rights. Like the Aboriginals are divided along state borders, the Sami are subject to the legal system of four countries. (Though we may consider the Sami Parliamentarian Conference—the joint conference of the Sami Parliaments' representatives—as (more of) a symbolic form of unification.)

In the Sami case, unlike what we saw in the Australian chapter, we find examples of what judicial answers can accommodate the specificities of Sami traditions. The traditional Sami way of life is closely linked to reindeer herding—and to land.

Europe is rightly considered to be obsessed with national minorities than with indigenous peoples. National minorities that could not exercise a right to self-determination (and as a result ended up 'on the wrong side of a border,' or that did not get a state on their own) were at the heart of the inter-war minority protection regime. Musgrave quotes an Australian government letter from 1929 saying that minority rights 'constitute a form of compensation offered to the minority by reason of the fact that the latter could not or has not been granted the right of self-determination.'[120]

Partially overlapping with the European inter-war national minority rights system, Inter-American organizations started to deal with indigenous rights, but in Europe they appeared on

119 See e.g. the statement of the Swedish government in the Observations by the Sami Parliament with regard to Sweden's 18th Periodic Report to the Committee for the Elimination of Racial Discrimination, from 2008, on page 3.

120 Musgrave 2000, 40.

the agenda not earlier than in the 1990s.[121] This is the time when organization like the European Community/European Union and the CSCE/OSCE started to mention indigenous rights in Europe. The most obvious case for a European indigenous population is the Sami, though other groups might be mentioned as well—mostly from the post-soviet block—like the Crimean Tatars, the Chechens, or the Abkhaz in Georgia.[122]

Though the international development towards the recognition of indigenous rights, including compensation and land rights, at least in a declaratory form, is clear, the status of the Sami in the different home states remains different. The guiding principles can be exemplified by a recent statement by the Swedish government:

> 'The Swedish Government bases its relations with the Sami people on dialogue, partnership and self-determination, with respect and responsibility for cultural identity.
> The Sami and other indigenous peoples must have the right to influence the use of land and natural resources that are important for their survival.
> The political discussion on self-determination cannot be separated from the question of land rights.
> The Sami relationship to the land is at the heart of the matter.
> The Government of Sweden must maintain a balance between the competing interests of different groups living in the same areas in northern Sweden.'[123]

In practice, however, this 'balance' between opposed interests (in land) remains to be achieved. E.g. in the Swedish *Reindeer Grazing* cases, the Sami parties had to provide proof for their status as legal owners of the territories in question. The main concern, as in the Australian cases, is the issue of lands that were granted to farmers during the process of nation-building and extension in these countries throughout the past two centuries. These

121 Errico and Hocking 2008, 364. However, the European Parliament adopted a document earlier, in 1989, on indigenous peoples—more specifically on Indians: European Parliament, Resolution on the Position of the World's Indians, 1989 reprinted in UN Doc E/CN.4/Sub.2/AC.4/1989/3, quoted by Errico and Hocking 2008, 368.

122 Kymlicka adds the Roma to this list. Kymlicka 2007, 285

123 See e.g. the statement of the Swedish government in the Observations by the Sami Parliament with regard to Sweden's 18th Periodic Report to the Committee for the Elimination of Racial Discrimination, from 2008, on page 3.

agricultural interests often conflict with the traditional activities of those Sami that still practice reindeer herding.

What we noted in the Australian case applies to the Sami: the lack of written proof for their holding lands or legal titles makes it nearly impossible to make their claims accepted before courts. Farmers of the majority populations, on the other hand, can easily document their acquisitions.

For a solution, we just have to cross the border:[124] the neighboring territories of the land claimed in the Swedish *Reindeer Grazing* cases were concerned in the *Selbu* case.[125] The Norwegian Supreme Court ruled that considering the widely known fact that Sami had been long present in the concerned area, the burden of proof lies on the (Norwegian) landowners, reversing the original logic. The Court, as if it had directly answered to the arguments of the decisions in favor of non-Sami, held that 'Decisive weight cannot therefore be placed on the fact that there are no registered Sami cultural relics within the areas in dispute.'[126] Rather the law applied 'must be understood to mean that it imposes on the landowners an onus of proof in the reindeer pasturing areas. However, the standard of proof is not so strict that anything more is required than a preponderance of probability that the use was not of sufficient extent for the area to be lawful reindeer pasturing territory.'[127] Here we see happening what was raised but did not occur in the Australian debate, a simple procedural solution to a problem caused by the cultural differences.

124 This division being again a constraint due to the majority legal and political system. Lars-Anders Baer, 'The Rights of Indigenous Peoples. A Brief Introduction in the Context of the Sámi,' *International Journal on Minority and Group Rights* 12 (2005): 264.

125 Norwegian Supreme Court, *Jon Inge Sirum v Essand Reindeer Pasturing District and Riast/Hylling Reindeer Pasturing District*, judgment of 21 June 2001 serial number 4B/2001

126 *Selbu* case, 67-68: *Jon Inge Sirum et al. v. Essand Reindeer Pasturing District and Riast/Hylling Reindeer Pasturing District*, No. 4B/2001 (21 June 2001) ('Selbu' case/Sami herding rights), judgment of the Norwegian Supreme Court. And further that 'the Sami did of course have oral accounts. Such accounts that have been handed down must be assessed meticulously, but cannot be generally rejected. And where they are supported by other information, they may be given increased weight.' *Selbu* case, 29

127 *Selbu* case, 24. And: 'there must be proof of a particular legal basis that leads to there being no right to exercise reindeer husbandry in stretches of unenclosed land within the reindeer pasturing areas'

For long, the majority consideration of the Sami followed a pattern similar to other indigenous cases. The idea of cultural hierarchy was translated into policy measures, and unlike (majority) agricultural activities, land use by the Sami was not considered as creating legal title over a territory. We should mention the delicate situation of the Sami due to the border wars between the Kingdom of Sweden and the Kingdom of Norway that touched their traditional territories. The agreement—the Lapp Codicil (or Kodicill)—is often referred to as the Magna Carta of the Sami, but in fact does not deal with questions of actual land ownership.[128] As a result of the land takings, Nordic countries extended their sovereignty over traditional Sami lands in the nineteenth century. They often discriminated against the Sami population, the 1902 Norwegian Land Sales Act prohibited the Sami to acquire land, the 1933 Reindeer Herding Act, while acknowledging certain herding rights, stipulated that in case of a conflict, rights of non-Sami should prevail over them. In Sweden, an official goal [129]

As a result of the complex history of both the assimilationist and discriminatory policies, by the end of World War II, Sami populations were seen as fully integrated into the population of the countries, and thus the concerned states did not apply ILO Convention No. 107[130] to them. It was the construction of the Alta Valley hydroelectric plant that both showed their distinct interests and claims and raised self-awareness in the members of the Sami people. The case was considered inadmissible by the European Commission of Human Rights, while the decision also held that the interference with the rights of the concerned Sami as members of a minority was 'in accordance with law, and necessary in a democratic society in the interests of the economic well-being of the country.'[131]

128 Errico and Hocking 2008, 372

129 Mattias Ahrén, 'Indigenous Peoples' Culture, Customs, and Traditions and Customary Law—The Saami People's perspective' in (2004) 21 *Arizona Journal of International and Comparative Law* 63 at 73, see Errico and Hocking 2008, 372-373, footnote 52

130 See Chapter 2. We should note here that Norway is the only country that ratified the ILO Convention No. 169, acknowledging its application to the Sami population.

131 Eur Comm of Human Rights, *G. and E. v Norway*, (application no 9278/81 and 9415/81), decision of 3 October 1983, para 2, p 7, quoted in Errico and Hocking 2008, 373-374

The Human Rights Committee also considered Sami cases in a number of occasions. In the *Ilmari Länsman et al. v. Finland* case (1992), Sami reindeer breeders challenged a contract between a private company and the Central Forestry Board allowing the extraction and transportation of stone.[132] These activities would be carried out in a period when reindeers do not pasture in the area, as requested by the Herdsmen's Committee. The HRC held that these activities did not have a substantial effect on the activities protected under Artircle 27 (that include traditional activities with modern means as well), and they did not amount to a breach of the Covenant. Had these activities been allowed in a larger scale, they might have been incompatible with Article 27.[133]

On the same token, the Committee found in the *Jouni E. Länsman et al. v. Finland* case that the challenged activities could constitute a breach of Article 27 were it more serious in its effects, but in the pending case, only 'limited impact' was found.[134] Thus the claimants, if it turns out that their predictions are right, can submit an other petition based on the new facts.[135]

While no violation was found in either case, the Committee made it clear that the interference with indigenous rights under Article 27 shall remain necessary and proportionate. This means a legitimate aim and a balance between this aim and the volume of interference. This sort of international protection has its limits, both in terms of actual impact on the lives of the Sami and of its linkage to culture—economic or self-determination rights in this context should be presented as a practice of culture.

132 Communication No 511/1992 : Finland. 08/11/94. CCPR/C/52/D/511/1992. 2.1, 2.3

133 *Ilmari Länsman et al. v. Finland* case, 7.4, 9.5, 9.6, 9.8 and 10

134 *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996). 10.7

135 A famous decision in the *Ivan Kitok v. Sweden* case (1985) dealt with the differentiation among the Sami. The claimant argued that it was unlawful for him to get less rights than other persons of Sami origin, based simply on the fact that the local Sami community did not grant him membership. The Committee held that this limitation was proportionate, and necessary to assure 'the preservation and well-being of the Sami minority' as a whole (9.5). Though proportionality seems to be at the very heart of the decision, the Committee did not consider arguments of proportionality in details, in practice. *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988)

What is of primary importance in the actual status of Sami land rights is the official stance on the arguments that the majority societies faced: the need for redressing past wrongs, an interpretation of nation-building history that did not simply cause sporadic injustices, but a more systematic oppression against the Sami, which was based on considerations deeply embedded in the construction of social and public institutions of the countries. As Williams argues, majority societies do not like guilt, and these kinds of arguments point to a fundamental error, a failure of the state to match with its guiding ideals.[136]

All measures concerning this Nordic indigenous people can be seen in this remedial context: the mere recognition as indigenous population, references to self-determination, land claims and the ruling of the courts, the introduction of the Sami parliaments—that took place first in Norway in 1989, then in Sweden (1993) and in Finland (1995)—and all related legislative measures.

As a result of the decision in the *Selbu* case (2001), the Norwegian legislation adopted the *Finnmark Act* (2005) that—following the arguments of the Norwegian Supreme Court—acknowledges that Sami, collectively or individually, have acquired certain rights through their traditional use of land and water for long.[137]

Finnmark is the northernmost and largest county of Norway, with the lowest population density, where most of the Norwegian Sami live (25 000 of the 40 000 in total).[138] Most of the territory, 96%, was state owned, and transferred to the 'inhabitants of the county,' to a board in fact. As Henriksen, Scheinin and Åhrén note, this is not self-determination, but a 'co-

136 David C. Williams, 'In Praise of Guilt: How the Yearning for Moral Purity Blocks Reparations for Native Americans,' in *Reparations for Indigenous Peoples. International and Comparative Perspectives,'* edited by Federico Lenzerini, (New York: Oxford University Press, 2008)

137 See Section 5 of the Act of 17 June 2005 No 85 relating to legal relations and management of land and natural resources in the country of Finnmark http://finnmarksloven.web4.acos.no/artikkel.aspx?AId=147&back=1&MId1=140 (last accessed on May 24, 2009): 'Relationship to established rights. Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark.'

138 Minority Rights Group. World Directory of Minorities and Indigenous Peoples, Norway, Sami. http://www.minorityrights.org/1499/norway/sami.html (last accessed on May 24, 2009)

determination,'[139] based on territory, and not group membership. As the allocation of lands is subject to a complex process according to the Act, its results remain to be seen.

The case in Sweden is in a certain sense similar, but worse in practice. The Boundary Commission was set up to identify what areas could count as Sami lands or lands over which Sami have other than ownership rights, but the procedure is based on the need for the Sami to prove that they owned the land for 90 years—thus an application of the Swedish general rules. As Lars-Anders Baer puts it in his letter as president of the board of the Sami Parliament to the Committee for the Elimination of Racial Discrimination, the judicial (and subsequently, governmental) recognition of Sami land rights remain theoretical.[140]

We could now contrast the situation to the now existing international principles, not only to Article 14-1 of the ILO Convention No. 169[141]—that only Norway ratified among the Nordic countries—but to Article 26 of the UN Declaration on the Rights of Indigenous Peoples:

> '1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. 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.
> 3. 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.'

It is clear in the Sami case that there is no way back: the Human Rights Committee refers to both Article 1 and Article 27 of the ICCPR in connection with land rights. An arrangement

139 John B. Henriksen, Martin Scheinin and Mattias Åhrén, The Saami People's Right to Self-determination. Background Material for the Nordic Saami Convention. *Gáldu Čála. Journal of Indigenous Peoples Rights* 3 (2007): 81.

140 Observations by the Sami Parliament with regard to Sweden's 18th Periodic Report to the Committee for the Elimination of Racial Discrimination, 2008, http://www.sametinget.se/4799 (last accessed on May 27, 2009), p. 4.

141 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.'

should have the support of the Sami community,[142] so this issue ceased to be the sole competence of the majority in the legislative body.

142 Martin Scheinin, *Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights*, Torkel Oppsahls minneseminar, Norwegian Centre for Human Rights, University of Oslo, April 28, 2004. http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf (last accessed on May 27, 2009), 16

Conclusion

Accepting collective compensation as a form of reparation is not obvious. We saw the difficulties of collective rights (Chapter 2) and of material guarantees (Chapter 1)—the intersection of the two is likely to be even more problematic. However, if we review the cases mentioned in the previous chapters, we can see different fields of application for this kind of measures, from the probably most serious human rights violation, genocide, to the problem of claim inheritance, or to hidden biases of the legal system. We can recall the Guatemalan case[143] where the Inter-American Court granted equal compensation (both pecuniary and non-pecuniary) to all the victims—making individualization virtual—and created state obligations that all the victims can benefit from.

The need for restoring (social and geographic) places of collective life may seem more pressing in the indigenous cases, but a right to reparation after wars, dictatorships, or acts of genocide should be available for the collectivities or cities, regions most heavily touched by the events. This seems to work in the case of states, but rarely for smaller communities not recognized on this 'highest' level. One sees the same interlock as in the case of the right of self-determination: this remains the privilege of a few.

The reason why land is a very sensitive question[144] is summed up well by Shelton: territorial gains are the modern states' *raison d'être*.[145] The Sami cases show that it makes a few ten thousands of people to challenge three of the most developed countries… and the Aboriginals to raise doubts about the level of Australian human rights protection and the coherence of the constitutional system.

143 The *Plan de Sánchez Massacre v. Guatemala* case in Chapter 4

144 …in addition to the fact that land or territory is closely related to sovereignty.

145 Shelton 2008, 48: 'the existence… of modern states are largely the result of acts and omissions that would be unlawful if done today.'

Although states are over the public and official condemnation of cultural hierarchy theories, they continue to build on the 'achievements' and the doctrines inherited from the era of past injustices. Facing and trying to overcome the past should include undoing it at the same time, as Professor Ní Aoláin put it: 'if the State seeks to escape or minimise its past, it will inevitably meet it again.'[146]

The main concern of present thesis was the dilemma between arguments based on *present* (situation) and on *past* (injustices), and the puzzle how to convert political claims into legally enforceable rights. The reviewed cases suggest that past related considerations should lead to a judicial answer for the *whether* or not (compensation is due), and the *what*, while the legislation can consider *how* is this compensation apt *here and now.*[147]

146 Fionnuala Ní Aoláin, 'Truth telling, accountability and the right to life,' *European Human Rights Law Review* 5 (2002), 590. Quoted by Mary O'Rowe, 'Truth and Justice,' *Democratic Dialogue* 15, 55

147 This means a shift toward 'minority policy considerations in compensatory measures' from 'minority policy measures based on compensatory arguments.' In the first case, the decision to compensate is made before the actual design, while in the latter, arguments of actual situation and effects may well prevail. (This does not mean that possible effects should not be considered in the first scenario, it simply means that such arguments cannot overthrow the mere act of (material) compensation.)

Annex

Table 1: Possible Classifications

1) Subjects of compensation
   a) Individuals: victims or descendants
   b) Communities (victims and / or descendants, putative community of those concerned)
      i) Preexisting legal personality (state / church / other, recognized collective entity)
      ii) No preexisting body: procedural organization, establishment of rules for membership and allocation

2) Objects of compensation
   a) Ownership
      i) Real estate
      ii) Assets
   b) Other rights
      i) Real estate related
      - Full rights, but without the recognition of ownership
      - Land use rights with a specific purpose (fishing, hunting, religious purposes etc.)

      ii) Remainder rights (as pension, insurance, hardship funds)
      iii)Intellectual property[148]

3) Legal grounds of compensation (type of human rights violations)
   a) Victims of discrimination (e.g. racially motivated acts)
   b) Victims of anti-democratic regime
   c) Victims of war, invasion
   d) Victims of colonial past and injustice

4) Legal titles of compensation
   a) Mandatory: property rights if not prescribed, under general civil law terms; international obligations
   b) Optional: policy question
   c) Issues of *novatio* (creating new title, *ipso iure*) and of prescription

148 Specific clauses exist in the case of indigenous peoples' intellectual property rights. See UNDRIP Articles 11-2 and 31 (and Article 24 on the traditional health practices). Several laws and declarations were issued on this topic, see e.g. the list of national protection measures on the site of the WIPO: Legislative Texts on the Protection of Traditional Cultural Expressions. http://www.wipo.int/tk/en/laws/folklore.html (last accessed on May 13, 2009) Indigenous intellectual property is partly covered by the protection provided in Article 8(j) of the Convention on Biological Diversity: In-situ Conservation. http://www.cbd.int/convention/articles.shtml?a=cbd-08, also: http://www.cbd.int/traditional/ and http://www.cbd.int/tk/ (last accessed on May 13, 2009)

5) Responsibility
   a) State or other legal personality held responsible
   b) No perpetrator or responsible identified

6) Actors of compensation
   a) State held responsible
      i) State failed to protect its citizen
      ii) State failed to protect its territory
      iii) State causing injury (including complicity, or other means of assistance, even where direct link could not be proven)
   b) Other, preexisting body (e.g. companies)
   c) Other body created for the management of the compensation process (e.g. international organizations, special funds that can involve several contributors, also state or international actors)

7) Method and size of compensation (mainly linked to the extent of the injury)
   a) compensation in whole (*in integrum restitutio*), coupon or valorizing system, or symbolic compensation; one time compensation or ongoing allowance
   b) universal solution (*ex lege*) or case-by-case decisions
   c) procedural and institutional background (special solutions)

8) Effect on the group (or just aim of the measures?)
   a) support for beginning a 'new life' or general improvement of living conditions
   b) symbolic justice doing
   c) founding and funding institutions, helping self-organizations (e.g. provide means to help struggles before courts, or to prevent further injuries), etc.

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