Contributing Paper

Reparations and the Right to Remedy

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1. INTRODUCTION

This paper on "Reparations and the Right to Remedy" represents a preliminary effort to articulate the legal basis for reparations. Other papers submitted to the World Commission on Dams analyze the underlying problems that produce rights-abusive conditions and, in their analyses, point to strategies and procedural changes that constitute principles for "best practice" in dam project planning, financing, mitigation and development, management, and remediation.[1] Findings from these papers include recognition that the social impact of large dams, especially the experience of indigenous peoples and ethnic minorities, has typically involved

- cultural alienation;
- dispossession from land, resources and the means to sustain a self-sufficient way of life;
- lack of consultation and meaningful participation in decision-making processes;
- lack of compensation or inadequate compensation;
- human rights abuses;
- failure to meaningfully participate in the benefits of development; and,
- lowering of living standards.

These papers have documented the overwhelming need for remediative action, arguing that dam development has involved significant incidents of noncompliance to contractual obligations and national and international laws, and has resulted in the involuntary displacement of millions of people whose losses have never been justly compensated.

While, it is beyond the scope of work for this paper to summarize the findings from World Commission on Dams hearings and reports of cases involving rights abuses and requiring some degree of reparations, the legal review of reparations is prefaced by a background section summarizing several dam development cases that illustrate a range of abuses and provide a starting point for the broader discussion of reparations. The wide range of violations and resulting problems mentioned here and discussed elsewhere in submissions to the World Commission on Dams suggest that responsibility to provide remedies is context-specific. Problems are rarely the simple result of failures of a single actor such as the State, but more typically involves failures of multiple actors including States, public and private financing institutions, and private organizations and entities engaged in planning, designing, building, implementing mitigation measures (including compensation and resettlement programs), and managing dam development projects.

This paper argues that reparations for dam-affected communities are warranted under existing international law, and that moral and legal culpability includes those parties who planned and authorized projects, as well as those who benefitted from dam development projects -- including States, funding institutions, contracting and construction companies, and energy and water system management companies. These arguments are based on a review of those specific international treaties, laws and norms that articulate a right to compensation and a right to remedy; the historical record of reparations; and, the evolving use of the concept, especially in cases where compensatory damages have been awarded as a means to redress the long-term, cumulative, and unanticipated damages associated with loss of critical resources and a way of life. The record of reparations includes those cases meant to compensate for war-related atrocities, and the emerging trend of reparations that recognize and compensate for loss of land, resources, health, livelihood, and way of life.

This paper concludes that meaningful reparations require efforts to repair, make amends, and compensate for damages. Given the nature of damages resulting from loss of land and a way of life, reparations imply remedies that:

- acknowledge and attempt to repair, make amends and compensate for past failures;
- address human environmental needs and reflect a commitment to restore human and environmental integrity;
- involve equitable decision making-processes; and,
- create or strengthen rights-protective mechanisms where claims can be made, damages assessed, culpability assigned, and remediative activities devised and implemented.

Reparations principles and possible funding mechanisms are presented as ideas meant to encourage and frame further efforts to achieve redress. Given the multiple actors involved and the diverse sociopolitical contexts in which dam projects have been built, the needs associated with achieving the right to remedy are numerous and complicated, and deserve much greater attention than has been paid in this paper. Thus, this paper is offered as a beginning point rather than concluding statement on reparations.

2. THE CASE FOR REPARATIONS FOR DAM-AFFECTED PEOPLES

In discussing reparation and restitution for past losses, the authors of the World Commission on Dams Thematic Review on Displacement, Resettlement, Rehabilitation, Reparation and Development conclude “There is no doubt that the issue of reparations is both complicated and costly. But then so is building dams. There is no need to make a case for reparations it is more a question of ‘how’ than ‘why’. (Bartolome et al, World Commission on Dams 2000:50).

By way of illustrating the contexts and experiences that prompted this statement and fuel the demand for reparations, a number of examples are summarized below. These include case summaries for Chixoy Dam, Guatemala; Kariba Dam, Zambia/Zimbabwe; and Tarbela Dam, Pakistan. By way of summarizing the human experience of dam-development and moving the discussion beyond a focus on social problems and towards consideration of remedy, this background section concludes with the Final Declaration from the Southern African Hearings for Communities Affected by Large Dams (November 1999).

2. 1. Chixoy Dam, Guatemala[2]

In 1975, Guatemala's National Institute for Electrification (INDE) announced approval for the "Chixoy Hydroelectric Project". The project was approved without consultation with affected communities; and with a largely inadequate environmental impact assessment. In 1976, the Inter-American Development Bank lent the Guatemalan government $105 million, one-third of the projected costs for Chixoy Dam. Shortly afterwards, INDE informed the people living in the affected area of the Rio Negro valley that a dam would be built and that they would be displaced. In 1978, Guatemala received a further loan of $72 million from the International Bank for Reconstruction and Development (IBRD, a member of the World Bank group). During the loan negotiations, the World Bank requested a resettlement plan. When it was completed in December 1979, the plan projected that 450 people would be displaced by the reservoir. The

Maya Achi (the inhabitants of Rio Negro) refused to move to the resettlement territory provided by INDE, and they began to be intimidated by military police and paramilitary groups. From March 1980 to September 1982, intimidation efforts escalated, resulting in the murder of 440 Maya Achi.[3] INDE began to fill the reservoir in 1982. In 1983, the Chixoy dam came into operation but was shut down four months later on the discovery of geological problems. In 1985 the World Bank approved a second loan for $44.6 million to cover cost overruns, and Chixoy reopened shortly thereafter.

Communities in Rio Negro suffered severely from the building of Chixoy Dam. Over half the population was massacred and the survivors forced to accept a resettlement agreement. The basin submerged land to a depth of 200 meters. The community lost 996.8 hectares and were promised compensation of 224 hectares. Some 741 farms and 54 brick houses were flooded. Ceremonial religious centers were destroyed. Families lost farm animals and pasture lands, as well as all arable land in the area. The river became polluted, and fisheries were destroyed. Many families lost their land titles and proof of their resettlement contracts. The community as a whole lost its sense of safety, security, psychological stability and cultural integrity. They also suffered from heightened conflicts with neighboring communities who competed for compensation. Both men and women lost their jobs. Displaced families were moved into four different communities in neighboring districts, dividing the community.

In 1996, following a report documenting these abuses by the ecumenical human rights group Witness for Peace, the World Bank sent a commission to Guatemala to investigate the causes of the violence and the implementation status of resettlement plans. This investigation examined INDE compliance with the Rio Negro Resettlement Agreement and found block houses had been promised but small, poorly built houses of half block/half wood were built and these quickly decayed. Titles were not granted, and not all promised houses were built. Potable water had been promised, but supply was expensive and infrequent. Free electricity had been promised and was provided. Five acres of fertile land per family was promised, but only 2.2 acres provided, most of this land was infertile, and no titles were given. While 152 families were identified in 1978 as eligible for land holdings, the 1983 census identified 106 families. Families who were displaced in the interim did not have their right to land recognized. A community truck had been promised and was never granted. Cash payments for lost crops were promised, but only minimal payments were awarded to 20% of affected families, and no payments to the remaining 80%. A church, school, health center, and access roads were promised and built. A boat was promised and never granted. Social services were promised, and minimal services received. The commission concluded that local people were never adequately compensated and urged INDE and the government to purchase more agricultural land, to facilitate the entitlement process for existing housing lots and land, and to try to fulfill these resettlement commitments by the end of 1997. The World Bank negotiated with FONAPAZ (National Fund for Peace) to help oversee and fund these commitments for the missing land. In 1998, INDE was privatized.

None of the authorities (the World Bank, INDE, or the Guatemalan government) has claimed responsibility for the human rights violations that accompanied the dam development process, or the inadequacies of the compensation and resettlement program. The World Bank noted that it failed to impress on the other parties the need for a clear-cut approach defining (i) the risks, (ii) the measures which would might minimize these risks, and (iii) which such measures should be adopted, which rejected, and why. The World Bank has acknowledged failures in their

compensation planning process and indicated willingness to work to ensure that more people received compensation. Towards this end, the World Bank has delegated to the National Fund for Peace (FONAPAZ) the responsibility of financing and overseeing the purchase of 330 acres of farmland, and the provision of training and technical assistance to the community. The World Bank has issued statements that it will fund no further reparation measures, as almost all relocated communities have reached the socioeconomic level they had in 1976 when relocation began.[4]

FONAPAZ finished titling lands in 1998, but Rio Negro affectees had little say in the choice of new land, which was based more on strategic protection from rebel forces than on the appropriateness of the land. Community leaders and the World Bank disagree on whether the recommendations of the 1996 World Bank mission have been fully implemented, especially the stipulations that replacement lands are of the same quantity and quality as that lost. No reparations have addressed the murder of 440 Maya Achi. The surviving population of Rio Negro includes 44 families with no land, 46 families with 5 or more acres of infertile land near Rabinal, and 62 families with 5 or more acres of fertile rainforest land far from the Maya Achi language area.

The community has established a committee of widows and orphans affected by violence in Rio Negro, and this committee searches for graves of those massacred, presses for exhumations and asks that those responsible for the massacres be tried. The affected communities also established an organization, ADIVIMA, to lobby for development assistance for the Rio Negro. The Rio Negro community works with NGOs in Guatemala as well as in the United States and Europe, and gave a presentation at the Latin American public hearings of the World Commission on Dams. In their presentations, members of the Rio Negro community charge that, despite statements by World Bank lawyers that all obligations have been met, the World Bank has failed to support a reparations process in line with the compensation criteria set out by a United Nations Truth Commission, and that the World Bank and the Inter-American Development Bank failed to adequately supervise the compensation process, noting that of the $8-12 million originally set aside for compensation, only $3 million has been used. Also, they note that land and housing appraisals were based on 1977 values, and compensation awards have depreciated substantially, thus they demand reparations based on the real present value of the land and goods they lost. Also, many did not receive promised payments for the area and quality of land lost, or for fruit trees and crops that were submerged. Most of the houses constructed under the resettlement scheme were built of wood, and quickly decayed. Barges, a truck, a fishing cooperative, and a bridge were promised but never granted. And, some 44 families received no compensation at all, because the original recipient is dead or has disappeared and they cannot prove entitlement. In addition to meaningful and just compensatory awards, the Maya Achi demand remedial actions including the construction of a monument to commemorate the 440 people massacred and bringing to justice the paramilitaries involved in the Rio Negro massacres.

2.2. Kariba Dam, Zambia/Zimbabwe [5]

The Zambezi River flows for 2,650 kilometers through central and southern Africa; it forms the border between Zambia and Zimbabwe. The Kariba Dam was constructed in the late 1950's to supply electricity for the burgeoning copper industry. The Federal Hydro-Electric Board of the then ruling British colonial government), decided to build Kariba after a favorable appraisal of

the project by the World Bank. This appraisal identified affected peoples, outlined resettlement plans, and identified a share of the project budget to be used for the resettlement of families to be displaced. In August 1955, the Federal Ministry of Power established the framework of resettlement. The territorial government would control resettlement. The Hydro-Electric Board's interests would be confined to total financial liability in terms of payment and the timing of removal. Compensation would not include "betterment", but only provision of land transportation, compensation and supervision.

The actual resettlement was begun at short notice with no public participation in the planning or opportunity to negotiate the terms of resettlement. Two groups were displaced, the Tonga and the Korekore. In Zambia, the Valley Tonga were told to abandon their ancestral land and move to more barren places. Many did not believe that the Zambezi, many miles from their villages, would rise, flood their homes, and force them to move. It was generally believed that this was a white man's trick to gain possession of their prized fertile land which they had cherished for thousands of years.

The resettlement program provoked strong feelings. In Zambia, opposition to Kariba and to resettlement came from the African nationalist movements: the African National Congress Party of Zambia and the Malawi Congress Party. The former was more focused on independence than dams, but the latter temporarily succeeded in preventing recruitment of contract labor from southern Malawi in 1956 after describing working conditions as being similar to slavery. Some were ready to fight and die for their land. In June 1958, for example, a District Commissioner was stoned in the Chiefdom of Chipepo. Three months later in the same Chiefdom, anti-resettlement protests culminated with groups of men armed with spears and shields attacking police. The police opened fire, killing eight people and injuring over thirty-two.

Information about resettlement was spread by Chiefs and their village headmen. The District Commissioner for Gwembe and his District Officers met with headmen at Siavonga and Manyumbe, who were directed to inform their people about resettlement. The government set two forms of compensation: general and individual. Some £200,000 in local authority or “tribal” compensation was paid October 1960, at a symbolic ceremony attended by all the Valley chiefs. Individual compensation was paid in three installments in 1958-60. The first award for £10, was compensation for huts which had to be abandoned. In the Chiefdom of Mweemba, people built both regular living huts and ngazi (huts on raised platforms) which were used both as granaries and as sleeping quarters. Here they received compensation for both, up to as much as £170, as opposed to £100 in the hut-only areas. The second and third payments of £5 and £2.10s per head were to compensate for loss of production owing to relocation. These were per capita payments made to everyone appearing on the village census register compiled shortly before relocation. The compensation was funded by the Federal Power Board rather than by the government of Northern Rhodesia. The government merely carried out the distribution. Individual compensation totaled £372,000. Some indirect' compensation, totaling £1,115,000, existed. This money, the Fund for Gwembe Rehabilitation, was probably used for social services, but no data exists to verify this.
Non-monetary compensation in Zambia included provision of social amenities in the area of resettlement. In 1956, a four-year development plan was drawn up. In 1957, four new lower primary schools and two upper primary schools opened. One of the upper schools became the first girl's upper school in the Gwembe Valley. By 1959, twenty-two prefabricated schools were

built to replace flooded schools. Six of these were extra schools that became necessary because of village groups being split up. In 1962, Chipepo Secondary School opened, and became the first and only school to offer post-primary education in the Valley. By 1958, seventy-seven water-wells and twenty-seven boreholes had been sunk. In 1959, seventeen additional boreholes were drilled throughout the resettlement area. The boreholes at Lusitu were found to be contaminated, and it was decided to pipe water directly from the Zambezi. No new health centers were built in the resettlement area.

In Southern Rhodesia (Zimbabwe), where the Ministry of Native Affairs was responsible for resettlement. Tonga chiefs were allowed to choose where to settle on the uplands. The government never intended to pay any monetary compensation to affectees, and it steered commercial fishing and other lakeside enterprises into European hands. They explicitly intended "to place [the Tonga] well away from the shores of the future lake where they would not interfere with its developments". Some 962 miles of access roads were built to serve the resettlement area. Numerous boreholes and wells were sunk and fitted with pumps; earth dams and weirs were built. People, belongings, grain and stock were transported to resettlement areas by truck. The Ministry built clinics and a complete new administration center at Binga, including a police station and hospital. Adult males were exempted from taxation for two years. In the resettlement area, people were given cut and bundled thatching grass, grain ration to meet their family needs for two seasons, powdered milk and vitaminised food concentrates. Regular medical attention and drugs were provided as required. Livestock was vaccinated against trypanosomiasis. All these were supplied free of charge.

The two countries spent £3,979,609 on resettlement out of the total project cost of £114,600,000. The average expenditure was £134 per person moved in Northern Rhodesia, and £59 per person moved in Southern Rhodesia.

Original estimates of affected peoples were grossly inaccurate, with over 57,000 people displaced-- almost double the projected number. Total Tonga population relocated was estimated at 57,000 (34,000 in Zambia, 23,000 in Zimbabwe). Total Korekore population relocated was significantly smaller, but the exact figure is not known. Both communities lost fertile alluvial soils. Owners of riparian zilili gardens lost the ability to cultivate dry-season crops, and many lost the ability to grow their historical commercial cash crop tobacco. Shrub grasses which provided support for livestock, and fruit trees, grasses and tuber used during food shortages were submerged. Many shrub grass species were unavailable in resettlement areas. Losses in livestock were very serious: around £48,000 worth of cattle, goats and sheep were lost in accidents while in transit to resettlement areas, and many more were lost through predation, poisonous plants, lack of suitable fodder, thirst and epidemics. Generally, the losses experienced by displaced communities were economic (loss of land and livelihood), political (loss of autonomy), socio-psychological (physical separation from relatives) and cultural (loss of shrines and burial sites). For the Tonga, the benefits, in the form of schools, clinics, and infrastructure development, were small compared to the losses.

Land provided for resettlement was grossly inadequate, especially given the loss of the fertile zilili gardens. The Department of Agriculture report for 1960 estimated that prior to dam construction there were 2,230 hectares of zilili gardens, 13,000 hectares of other alluvial gardens and 11,300 hectares of upland gardens. All of the first two groups are now submerged. The

former valley uplands now constitute the Gwembe Valley between lake Kariba and the Zambezi escarpment. Fifty-seven percent of arable land was lost, and the riparian population was relocated to the uplands. In Mweemba Chiefdom about 7,500 people were resettled in an area whose arable land's carrying capacity was estimated at only 2,300. Population density ranged from 100 to more than 300 per square mile in some resettlement areas. In the mid-1960s, William Allan observed that the Gwembe Valley's cultivable soils had been "much over-cultivated under pressure of population."

The reservoir was made the boundary between Northern and Southern Rhodesia, which later became Zambia and Zimbabwe; at independence, border posts separated Tonga clans from one another. Many Tonga, grieved at the separation, sought to join relatives in Zambia but were refused.

While colonial and Federal Power Board officials were aware of Valley Tonga burial customs, social impacts of the loss of shrines and ancestral graves were not considered relevant to the dam development decision making process. Tonga shrines represent the relationship of that community to a particular physical environment. Resettlement plans prepared by the colonial government proposed the transfer of valley shrines to resettlement areas-- an inadequate response given the place-based nature of these shrines.

Downstream communities in Zambia, those from near the dam wall, and those upstream were also affected. Downstream communities have suffered from productivity losses caused by fluctuating water release levels. Land planted with crops dried up when reservoir levels fell below expectations (as in 1994), or died from flooding when levels rose too high (as in 1995). Villagers now hesitate to plant fertile areas because of the fear that either may happen again. Downstream in Zimbabwe lay a wilderness: there the project affected wildlife rather than people.

In Zimbabwe affectees were relocated to uninhabited areas without host communities. In the Gwembe area of Zambia, host communities had to share farm and grazing land with affectees: overcrowding caused land quality and availability to decline. The 1958-60 famine can safely be ascribed to resettlement factors: many farmers were ill and unable to work, affectees had not yet cleared sufficient land for farming, and traditional Tongan farming techniques were unsustainable in the new region. Some 38,000 bags of maize had to be distributed in the region between 1958 and 1960, and the government required that it be purchased using compensation money. As a result, affectees felt cheated of proper compensation. In the years since environmental and social conditions continued to deteriorate and many community members left the area in search of better land. In the 1980s and 1990s, chronic droughts ravaged the already semi-arid Gwembe region further intensifying famine conditions.

In 1998 the World Bank approved the Zambia - Power Rehabilitation Project. In addition to energy infrastructure improvements, the project acknowledges the failure of the original Kariba resettlement process. According to the project appraisal document, "[t]he construction of the Kariba Dam on the Zambezi River between the Northern and Southern Rhodesia in 1958 required the resettlement of 57,000 Gwembe-Tonga peoples; 34,000 of these were resettled on the north bank, now Zambian side. In retrospect, it is clear that the resettlement was not sufficiently well planned or well implemented. Consequently, the socio-economic and local environmental conditions of the resettlers and resident hosts have deteriorated to the point where

a rehabilitation of the lands and social structures will be undertaken by Zambia. This component of the project aims at improving the life of affected people living in Gwembe valley. Its activities are based on a consultative survey and study of the region prepared by the Institute of Social and Economic Research (INESOR) of the University of Zambia. The Project aims to balance infrastructure needs with food production activities and includes: rehabilitation of the "bottom road" that connects the three resettlement districts (365 km); a water quality survey, supply improvement measures including tubewells and small dams and, a pilot program for low cost treatment of water; the development of recession agriculture in Kariba lake draw down areas; a pilot rain harvesting project; agricultural extension activities regarding cropping patterns, grazing, small-scale irrigation, pest control and storage of food grains; a fund to support micro-projects dealing with land use; construction and renovation of health clinics, and programs for malaria, bilharzia, cholera and HIV/AIDS; and, provision of electrical service to three of the large villages (Chipepo, Gwembe Boma and Sinazeze) as well as the area around the lake shore." Project implementation was delayed when a consultant was killed by a landmine and several others injured. The project is now identifying consultants and contractors, and its success remains to be seen.[6]

Current conditions in the Gwembe Valley reflect continued degradation rather than marked improvement. Most wells and boreholes sunk during resettlement program have since dried up or broken down. Gwembe Valley Rivers, which were perennial in the 1960s and the 1970s, became sand beds during the 1980s and 1990s. Tonga women and children walk long distances to draw water. Following the end of Zimbabwe's guerrilla war and the subsequent independence of that country, there was a sudden influx of commercial Kapenta fishermen using big fishing rigs and of foreign investors who took up the northern shoreline of the lake, displacing local people. Currently, there are over 30 foreign investors there, involved in a number of activities including crocodile farming and game ranching. Recently, 4600 hectares of land was alienated to about forty foreign investors in the Chiefdom of Simamba; in Sinazongwe more than 1600 people were dispossessed in 1985 to pave the way for a huge irrigation farm. These are all indirect effects of Kariba.

In Zimbabwe, well water and boreholes provided water, but the water was either dirty or salty. More than sixty percent of the boreholes failed to provide water; others dried up during the dry season. When the Tonga arrived in their resettlement areas, they had to store their belongings under trees and sleep in the open. The Tonga depend entirely on the rains for their crops to grow and mature, and the rains have been unreliable.

In addition to the many failures describe above, monetary compensation was distributed without clear guidelines as to who should really benefit. Thus, in most cases compensation awards for households were granted to men who used funds for their own purposes, rather than supporting the needs of the women and children in the household.

The provision of health services was indicated as one of the positive changes since resettlement, although it was observed that more people are now dying from many illnesses. Some indicated that access to education improved compared to the time before the dam. However, many parents cannot afford secondary school fees for their children. Tonga is not taught in schools, and parents and children sometimes have trouble communicating.

In 1999, the bilateral Zambezi River Authority (ZRA)-- recognizing that insufficient time was allocated to the planning and implementation of the resettlement program, insufficient resources were made available, compensation was not provided to those displaced in Zimbabwe, and compensation was or was grossly insufficient to those displaced in Zambia-- initiated the Zambezi Valley Development Fund to address the needs of people displaced by the Kariba Dam Project in Zambia and Zimbabwe. The ZRA found that inadequacies in the original compensation and resettlement plan were derived from an individual/private property rights bias, people whose rights were defined by customary laws and communal relationships were not deemed eligible for damages. Communally owned and occupied land was seen to be legally owned and controlled by the State, and the State could not compensate itself. The Zambezi Valley Development Fund is a rural development scheme that forms part of a power-sector rehabilitation project funded by the World Bank.

At present, Zimbabwean rural development policies have no particular focus on those displaced by dams, and there are insufficient governmental resources to address the issue. However, the Zambezi River Authority, has tried to help the Tonga affectees via the Zambezi Valley Development Fund. This Fund is financed through donations, fund-raising activities by ZRA and an 1% levy on water bills for the water used for power generation. How this will affect the Tonga is as yet unknown, but the fund and related projects have begun in earnest.

Emerging from the testimonies of people whose lives were affected by Kariba Dam is the notion that development occurred at the cost of people and their way of life, and that meaningful reparations must include enjoyment of the benefits of development. Thus, for example, dam-affected communities might be granted a percentage in project revenues in Kariba generated resources, with generated income contributing towards the overall development of the Gwembe Valley.

2.3. Tarbela Dam, Pakistan[7]

Tarbela Dam was built on the Indus, about 45 miles NW of Islamabad. It was initially built to strengthen Pakistan's agricultural capacity, especially wheat production, and was later converted to a hydropower project, which now produces about 3500 MW per year. The dam became fully operational in the summer of 1976, two years behind schedule, at a cost overrun of 81%. By 1993, power production from the dam was about two-thirds higher than expected. However, downstream salinization and erosion hampered planned increases in agricultural production. Upstream, siltation is much higher than originally projected: unless another dam is built upstream, Tarbela will be useless for power generation within thirty years.

The dam affected 32,800 hectares of land, and some 96,000 people in 135 villages. Resettlement took place under the provisions of the 1894 Land Acquisition Act, and as decided at the May 1967 High Level Meeting, chaired by the President of Pakistan, General Ayub Khan. The Land Acquisition Act was drafted to meet the needs of a colonial administration and offered no suggested meaning of or procedure for resettlement: there was no concern to restore the affectees' previous quality of life, and it was decided that only those who hold title to land would receive compensation. Landless affectees would not receive the benefits of the resettlement program.

The original procedure for claiming alternate land required receipt of a notice from the State confirming the displaced household's right to a new home. Affected households were then required to complete an accompanying application for land form, submit it, and wait for receipt of an allotment chit, which specified their replacement landholding and size of house. Displaced households were promised in exchange for their homes and lands, alternate land in and around several new, larger model villages, which would be equipped with modern social services such as health, education and transport links. These villages, it was implied, would therefore have greater potential for economic development. Thus, villagers were offered not simply the restoration of their previous standard of living, but the implicit means to improve it by their change of location.

During the implementation of the resettlement plan, a number of bureaucratic problems arose:

- Some affected peoples failed to apply for alternate land at all, through negligence or illiteracy.
- Some affected peoples were not entitled to alternate land, because they were renting at the time of the resettlement, or sharing a house with title-holders, or were wholly landless.
- Some affected peoples applied for alternate land but never received their proper allotment chit.
- Some affected peoples received their proper allotment chit, but were unable to take possession of their alternate land because the Sindh government, in a dispute with Punjab over water rights, pulled out of the resettlement project, annexing a large proportion of the land set aside for resettlement. This land was used in part for a technology college, and to date the Sindhi government has refused either to return the land or find other resettlement sites.

Tarbela was planned and built in rapid fashion, and its construction was personally authorized by General Ayub Khan. Community groups, such as the Pakistan Network of Rivers, Dams and People, did not form until the mid-1990s. Community groups have focused on obtaining full reparations for the Tarbela affectees, and on ensuring public participation in decision-making over later dams such as Kalabagh and Ghazi Barotha. Chief grievances have been that compensation for land was based on rates at the time of displacement, but in the interim, land costs have risen, and it is now impossible for many to purchase land of the proper size or quality; and that, while veterans and civil servants are entitled to lifetime state pensions and a constellation of other "national servant" benefits, affectees are not.

Pressure from community-based groups prompted the Water and Power Development Authority to commission an independent review of reparations in 1996. This review found some 2,197 outstanding claims in Sindh. In addition to these claims, many lost access and rights to use common property resources. And, the many who lacked title to land received no compensation at all. Most of those lacking title were women. Because claims were evaluated on a household rather than a per capita basis, household compensation went to men.

Resettlement also caused cultural damage. Hazarawal and Pashtun small-scale farmers had to adopt the dress, music and habits of the settlement areas. Tribal clans were broken up and resettled to different villages. Women who had previously been permitted to walk freely in their home villages were now confined to their homes, because there was a chance now of meeting a

non-relative. The monetarization of their economy led to increased cultivation and use of opium. Affected peoples have also lost fishing rights, and while the Water and Power Development Authority constructed hatcheries as part of the dam compensation scheme, the operation was sold to non-affectees (for a return of a proportion of profits). Those who formerly fished along the river did not received compensation, and are now heavily indebted to middlemen. Non-hatchery fish stock is small and shrinking.

With input from the Water and Power Development Authority and local community groups, the study put forth recommendations for fulfilling compensation obligations, including retroactive land allowance payments with interest, and the Water and Power Development Authority identified the existence of alternative land for compensating displaced peoples, making land-for-land compensation possible according to certain suggested rules:

1. The resettlement land cannot be obtained by involuntary removal of the current occupants (as per the Land Acquisition Act).
2. The costs of developing the land will be borne by the Water and Power Development Authority and the Government of Pakistan. This recognizes the fact that over a quarter of a century has passed since the original plan, and most affected peoples have spent their original cash compensation.
3. The resettlement land is to be certified as efficiently and sustainably irrigable.
4. The communities into which the affected peoples would settle are to be informed, and the conditions of resettlement are to be negotiated with their representatives.

The Government of Pakistan has acknowledged the findings of the 1996 reparations review, but has failed to implement its recommendations as of May 2000. In particular, it acknowledges that one should not simply assess the harm suffered by affectees at the time, but agrees in principle that measures should be implemented to raise the socioeconomic conditions of resettlement towns to above the pre-dam level. The Government of Sindh has not apologized for its seizure of land, claiming it as rightful compensation for water diversions to Punjab, and it is very unlikely that it will return the land. The Water and Power Development Authority commissioned the 1996 study, which acknowledges that Sindhi affectees have a just claim to compensation of around Rs.750,000 each ($14,700).

All authorities recognize the failure of previous compensation schemes in principle, and that the Government of Pakistan is legally required to provide cash compensation. In 1995 the World Bank approved a loan for the Ghazi Barotha hydro project conditional upon resolution of Tarbela Dam compensation disputes. Tarbel Dam is directly upstream from Ghazi Barotha, and also funded by the World Bank. However, the current state of coup and crisis in Pakistan makes full, fair and prompt payment of reparations problematic.

2.4. Voices of the Affected Communities

Representatives from dam-affected communities all over the world have testified before the World Commission on Dams (WCD) and their voices have influenced and shaped calls for remedial actions contained in the many thematic reviews prepared for the WCD as part of its information-gathering activity. Their testimonies describe the extreme hardships encountered while struggling to adjust to the loss of homes, land, critical resources, and the means to sustain a meaningful way of life. Testimonies typically conclude with calls for assistance in achieving

some measure of justice-- echoing the demands for reparations, retroactive compensation, and remediative actions articulated in the 1994 Manibeli Declaration, the 1997 Curitiba Declaration[8] and captured in the Final Declaration emerging from the November 1999 Southern African Hearings for Communities Affected by Large Dams which states:[9]

> The history of large dams and affected communities in Southern Africa has been one of broken promises and incalculable losses:
>
> We lost our livelihoods and cannot regain them;
> Our land where we grew food was taken from us and not replaced;
> Our homes were demolished or drowned;
> Our livestock were taken from us;
> We lost control of our natural resources,
> Our wildlife have disappeared;
> Our cultural values, functions and roots have been destroyed;
> Our ancestors' graves have been buried under deep water, and
> The lives of some of our community and family members were violently taken from us.
>
> Large dams have also caused:
>
> A decrease in our standard of living,
> A decrease in our level of health,
> Costs for resources we previously used freely,
> Increases in HIV/AIDS, crime and other urban problems, and
> Conflicts in our communities where there once were none.
>
> In our experience, the history of large dams is one of broken promises. Large dams have been built:
>
> with inadequate community participation,
> with too few jobs going to local people,
> with inadequate education and information dissemination, and,
> with inadequate compensation and resettlement resources, especially land.
>
> We have been forced to move against our will without knowing when or where we would be going, and without a way for our concerns or objections to be heard.
>
> We have not been treated with dignity, nor with respect for our customs, our ancestors or our children.
>
> We have shouldered the burden of large dams, but we have enjoyed very few of the benefits. In short, large dams have been devastating to many of our communities.
>
> To ensure that these past injustices are rectified we urge the following:
>
> Claims of past injustices should be addressed by Human Rights Commissions where applicable;
> Governments should compensate us for outstanding losses and damages caused by large dams;
> The issue of compensation and reparations for outstanding losses and damages must be addressed by governments, the Commonwealth and the Queen of England for Kariba Dam injustices; and
> An independent institution should be created to address all outstanding claims and broken promises.
>
> To ensure that in the future, communities are treated in a just, equitable and dignified manner we make the following requests:
>
> Dams must be seen as a means to development, not an end in themselves.
> Affected communities must be allowed to participate as equal partners in the process. This means the following:
> Communities become "shareholders" of dam projects, resulting in benefits accruing directly to communities through such mechanisms as trust funds;
> Communities, including end-user communities, are involved in the decision-making process before the decision to build has been made;
> A process is established to facilitate negotiated agreements on key aspects of projects, including compensation, resettlement and benefit-sharing.

In order to facilitate effective participation of communities in the decision-making and implementation process, and to increase openness and transparency, the following must be done.

Empower communities, including informing them of their rights;
Increase the involvement of local and international NGOs and the media;
Facilitate the development of community committees;
Strengthen other existing locally based structures;
Provide capacity building and training programmes, including those related to home construction;
Make available to the public all project documents, including budgets; and
Provide funds for community and NGO participation.

In order to ensure that projects are implemented properly and promises are not broken, Government, project authorities and other project developers must take responsibility and enter into binding and enforceable contracts for compensation and resettlement programmes. These contracts must be properly negotiated and agreed upon with affected communities.

Resettlement and compensation issues must be resolved to the satisfaction of communities before construction begins. For ongoing commitments of government, project authorities and other project developers, milestones of progress must be established and sanctions imposed if not met. As long as they continue to stand, dams must be monitored, including dam safety and impacts on community health and sanitation.

Communities must be treated with dignity and respect in the resettlement and compensation process:

A rigorous and thorough social and environmental impact assessment must be done.
Families must be kept together.
Ancestors' graves must be moved with families.
Facilities such as health and education must be in place before resettlement begins.
Land of suitable quality and quantity must be made available.
Compensation must be adequate and fair, and based on the concept of "a structure for a structure".
Institutions and processes for making and addressing claims must be created, and community representatives must be part of these institutions.
On the broader level, communities request the following:
International law must be created to enforce just compensation, resettlement and benefit-sharing.
An independent body must be created to address future ongoing and future dam issues.
A moratorium on new dams should be instituted until the World Commission on Dams has published its findings, criteria and standards.

3. THE LEGAL BASIS FOR REPARATIONS [10]

3.1. International Law

International law can be seen as those customs, duties and obligations recognized by sovereign States as rules that govern interactions, establish order, and maintain peace in the international arena. One of the duties of States is to live up to international obligations. When obligations are not met and subsequent injury experienced, the offender is obligated to acknowledge responsibility and take actions to alleviate that responsibility.

Sovereign States are the typical actors in international law-- they establish rules, have the obligation and duty to implement and enforce rules, and bear the responsibility to make amends for injuries resulting from violation of rules. In recent decades recognized actors in international law have expanded to also include international organizations, such as the United Nations. For an organization to be amenable under international law it must have an "international legal

personality." Organizations acquire international personality when they possess such organs that are capable of exercising international capacity and responsibilities. While organizations with international personality are given some rights and duties in international law, they are not States with all the rights and duties of States. International personality confers upon organizations limited rights to operate in the international arena. International legal personality allows organizations to sign onto treaties, sail ships under their own flag, maintain international peacekeeping forces, bring claims for breaches of international obligations, and create diplomatic ties with States. Organizations with international personality have international obligations that, when violated, produce a responsibility for injuries. Thus, organizations with international personality may be sued under international law.

There are two primary ways to terminate international responsibility: (1) to excuse a breach of international obligation, or (2) to extinguish a breach of international obligation. Violations may be excused by successfully arguing consent, necessity, fortuitous events and force majeure, self defense, or countermeasures. When any of these circumstances are successfully invoked, the obligation is not considered breached and the State remains in good standing in the international community. When the breach of the obligation is wrongful, the offending state or organization may extinguish the breach of international obligation and regain good standing in the international community by making reparations to the offended party.

3.2. Reparation

Reparation is defined as being action or processes that repair, make amends, or compensate for damages.[11] In a legal sense, there are three generally recognized forms of reparation: restitution, indemnity (or compensation), and satisfaction. Restitution is designed to put the offended state back in the position it would have been had the breach not occurred, and may include performance of the obligation, revocation of the offending act, or abstention of the unlawful conduct. In the case of dam development projects funded by international organizations, a breach of obligations established in project funding agreements creates the legal responsibility for remedy. Thus, a breach of obligations to mitigate adverse socioenvironmental impacts might be resolved by mid-project revisions, or the post-project allocation of new funds and implementation of new programs of action that improve degraded environments (human and watershed systems) and restore lost resources (e.g., fisheries and watershed restoration, removal of dam structures).[12]

Indemnity, also termed compensation, involves the payment of money to the offended party for any losses incurred by the illegal act, including any lost profit or value of lost property. In dam development projects “compensation” typically refers to indemnity payments to dam-affected peoples to compensate for the loss of assets and property. Indemnity payments might be used to fund a variety of remedial actions, including resettlement plans, development programs, and the like, but as Bartolome et al (World Commission on Dams 2000) has noted, in most dam development projects the basis of compensation has been (1) legal ownership and (2) individual claim with loss value calculated according to prevailing market rates as an average of registered sales prices (of land and other economic assets) in the recent past. Thus, this form of reparation generally represents indemnity payments based on market values, rather than replacement values (World Commission on Dams 2000,p. 9). In the context of reparations for dam-affected peoples, the responsibility to redress the needs of people who were displaced without prior consultation

and without compensation might be met through post-project indemnity payments to individuals and families.

Satisfaction includes almost every other form of reparation and is meant to address any non-material damage. Examples of satisfaction include a formal apology or discipline of guilty individuals.[13] In the case of dam development projects, where socioenvironmental obligations have not been met because funds were misallocated or appropriated, satisfaction might include criminal proceedings of culpable parties. Satisfaction might consist of public acknowledgements that a wrong was committed and formal apologies to those who experienced harm.[14] And, satisfaction might include damage awards for hardships encountered as a result of the long term and cumulative affects from the original breach of obligation.

The term “reparations” generally refers to compensation or remuneration required from a defeated nation as indemnity for damage or injury during a war. This particular usage emerged from customary law established by the Hague IV Convention in 1907. The Hague IV Convention established distinctions between combatant and non-combatant populations and property and forbade States to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war" (article 23g). The convention also forbade the confiscation of private property and pillaging, codifying customary law that had its roots in the Napoleonic wars. Up until Hague IV, violations of the customary rules of warfare did not require compensation unless explicitly stipulated in the peace treaty ending the conflict. The Hague IV Convention, however, provided that a "belligerent party which violates the provisions of the said regulations shall... be liable to pay compensation." After the Hague Convention, most powers recognized the principle that private property (with certain exceptions) has to be respected in the course of war on land and it is prohibited to confiscate such property without military necessity.

The process to claim reparations is varied. Many States will make reparations on their own, without outside intervention, especially when facing the political consequences of their breach of international obligations. For other breaches, injured parties may find it necessary to make a claim for reparations before a national or international tribunal. Which tribunal will hear a case is dependent on the law or treaty setting up the tribunal, any discretion that the tribunals may have in turning away cases, and whether the parties have agreed to adjudication before the tribunal. To make a claim, an injured party must have standing (whether the party making the claim was owed an obligation and whether they in fact suffered injury). In addition to standing, most international agreements and court procedure seem to require negotiation as a prerequisite to filing claims in an international tribunal. Customary international law also requires claimants to exhaust local remedies before bringing some types of claims.

Until recently, the majority of cases involving reparations acknowledged and compensated victims of war-related atrocities, especially those surrounding the events of World War II. However, with the creation of human rights treaties and the expansion of international and national human rights and environmental law, a broader range of rights has been acknowledged, abuses or violations of rights documented, and increasingly, reparations are being made to redress violations of international law committed in the name of colonial expansion, economic development, and national security. Some of these examples will be explored in greater detail later in this paper.

3.3. Sources of Law

The Statute of the International Court of Justice states three sources of law applied by the Court:

- international conventions (treaties) that establish rules expressly recognized by contesting States,
- international custom, as evidence of a general practice accepted as law, and
- general principles of law (article 38.1).

This provision has come to represent the general reference point for acceptable sources of law. The sources of law pertaining to the right to compensation and a right to remedy include multinational declarations, treaties, and resolutions; and, the interpretation and implementation of these principles as evidenced by international and national legislative and judicial actions.[15]

While multinational declarations are often not legally binding, they reflect regional or universal consensus on issues and may embody customary international law. Declarations are often the first step toward codification of new legal rights. When embodied in an international convention, the declaration becomes a treaty, and signatories become obligated to implement the principles contained within. Implementing mechanisms include provisions and rights stipulated in national constitutions, legislation, or judicial decisions, as well as governmental procedures and policies. All countries that have ratified human rights conventions are required to legislate the domestic law necessary to implement them.[16]

Resolutions of the United Nations General Assembly are issued for the purpose of "promoting international cooperation in the political field and encouraging the progressive development of international law and its codification (United Nations Charter, Article 13.1). Originally seen as nonbinding opinions of various majorities of States on particular issues, Resolutions of the United Nations General Assembly are increasingly seen as indicative of States' understanding of directions where international law is or should be heading. Thus, domestic courts have looked to the General Assembly as evidence in part of customary law on particular issues.[17]

Human rights principles also influence the conduct of international organizations and private entities which have an interest in avoiding legal violations and maintaining a positive public image (Popovic 1996:494).

3.3.1. Rights to Reparations Established via United Nations Treaties

Rights to Life, Liberty and Security of Person

Article 3 of The Universal Declaration of Human Rights (A/RES/217 A (III), 10 December 1948) proclaims three interrelated rights: the right to life, the right to liberty, and the right to security of person. These rights serve as the fundamental base from which civil and political rights are developed, including the right to remedy when fundamental rights are abused.

Right to Remedy

Article 8 of The Universal Declaration of Human Rights states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Reconfirmation of the Right to Remedy: The International Covenant on Civil and Political Rights (A/RES/2200 A (XXI), 16 December 1966 reconfirmed the right to remedy articulated in the Universal Declaration of Human Rights, stating "Each State Party to the present Covenant undertakes:

- To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by an other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedies;
- To ensure that the competent authorities shall enforce such remedies when granted" (Part II, Article 2.3).

As of 1995, a total of 130 States were Parties to this covenant.

Development, Resource Rights, and the Right to Compensation

The United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources (A/RES/1803 (XVII), 14 December 1962) declares that:

- The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and the well-being of the people of the State concerned." (A/RES/1803.1).

- Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security, or national interest which are recognized as overriding individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute shall be made through arbitration or international adjudication. " (A/RES/1803.4).

- Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution. (A/RES/18038).

Right to Self-determination and Subsistence

The International Covenant on Economic, Social and Cultural Rights (A/RES/2200 A (XXI), 16 December 1966) state:

- All peoples have the right to self-determination (article 1.1).

- 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 cooperation, 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).

- The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (article 11.1)

As of 1995, a total of 132 States were Parties to this covenant.

Participation in Development, Rights to Fair Distribution of Development Benefits
Declaration on the Right to Development (A/RES/41/128, 4 December 1986) article 2.3: "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."

The right to development as articulated in this resolution has been endorsed by all member nations of the United Nations.

The rights of groups
The rights of groups, as opposed to the rights of the person, are protected in the Genocide Convention; International Labour Organization (ILO) Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entered into force in 1959, ratified by 27 States, with 20 ratifications in force as of 1 January 1999); and, ILO 169 entered into force in 1989 as the Convention Concerning Indigenous and Tribal Peoples in Independent Countries.[18]

The Convention on the Prevention and Punishment of Genocide (entered into force in 1951) prohibits "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (article 2). As of 1 January 1999, 128 members of the United Nations had ratified this convention.

ILO 107, Article 11, calls on States to recognize "the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy."

ILO 169. In 1989, the ILO adopted a revised and expanded version of ILO 107 entitled the "Convention Concerning Indigenous and Tribal Peoples in Independent Countries" (ILO 169, entered into force September 1991). ILO 169's preamble states that developments in international law since 1957 and the aspirations of indigenous peoples to control their own institutions made it "appropriate to adopt new international standards on the subject [of indigenous rights] with a view to removing the assimilationist orientation of the earlier standards."

- Article 2 guarantees government protection of indigenous rights in general: "Governments shall have the responsibility for developing, with the participation of

the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."

- Article 4.1 states "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned."

- Article 7.1 provides that "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

- Article 7.4 states "Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."

- Article 13 provides that "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands...which they occupy or otherwise use."

- Article 15.1 states "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded."

- Article 16 offers protections and safeguards for indigenous peoples against their removal from their lands.

- Article 32 calls on governments to take appropriate measures to facilitate contacts between indigenous and tribal peoples across state borders and to facilitate their cooperation in economic, social, cultural, spiritual and environmental fields.

As of 1 January 1999, twenty countries are ratifying parties to ILO 107 and thirteen to ILO 169 (these thirteen are: Bolivia, Columbia, Costa Rica, Denmark, Equator, Fiji, Guatemala, Honduras, Mexico, the Netherlands, Norway, Paraguay, and Peru).

Provisions concerning the rights of indigenous peoples can also be found in instruments of a more
general nature, such as the Rio Declaration, the World Charter for Nature, and Chapter 26 of Agenda 21, as well as development policies and procedural guidelines for multinational financial institutions. World Bank is currently in the process of revising Operational Directive 4. 20 which will soon be reissued as Operational Policy 4. 10 on indigenous peoples. In 1995, as a first step towards the formulation of a policy in this domain, the Asian Development Bank (ADB) prepared a draft Working Paper on Indigenous Peoples. In its Strategies and Procedures on Socio-Cultural Issues, adopted in 1990, the Inter-American Development Bank (IDB) outlines the principles and actions required when projects affect indigenous communities.

Indigenous rights are also established in the international development policies of many States. In 1993, for example, the Government of the Netherlands adopted its policy paper on Indigenous Peoples in the Netherlands Foreign Policy and Development Cooperation; the following year Denmark published its Strategy for Danish Support to Indigenous Peoples. After consultations with a broad range of governmental and non-governmental agencies in the Steering Committee for the International Year of the Indigenous People, Belgium issued a policy paper on indigenous peoples and development cooperation in January 1994. The Agreement establishing the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean, signed by the Ibero-American heads of State in July 1992, also refers to ILO Convention No. 169 in its preamble and uses the Convention's provisions to describe the peoples and communities covered by the Fund.

3.2.2. Sources of Law Governing Transnational Degradation: U.N. Declarations and Resolutions

The Stockholm Declaration on the Human Environment (1972) states in Principle 21 that States have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States."

This responsibility is reiterated and expanded in the U. N. General Assembly Resolution on the World Charter for Nature (G.A.Res.37/7, U.N.Doc A/37/51,1982) whereby States and other public authorities, international organizations, individuals, groups and corporations are urged to "ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in areas beyond the limits of national jurisdiction."

This responsibility is also reconfirmed in Principle 2 of the Rio Declaration, and the prohibition and designation of liability for transboundary environmental impacts is established in a number of international agreements pertaining to oil pollution, air pollution, movement and disposal of hazardous wastes.

3.3.3. Sources of Law: Relevant International Court of Justice Findings [19]

Disputes between States concerning violations of international law can be argued before the International Court of Justice (World Court). To file a case with the World Court, both parties must accept the Court's jurisdiction. Judgments of the Court can include "breach of legal obligation" findings and result in reparations for damages.

For example, in a current case filed with the Court, the Republic of Croatia has instituted proceedings against the Federal Republic of Yugoslavia, citing violation of Article IX the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which provides that disputes between parties relating to the interpretation, application or fulfillment of the Convention shall be submitted to the International Court of Justice. In its Application, Croatia contends that "by directly controlling the activity of its armed forces, intelligence agents, and various paramilitary detachments, on the territory of Croatia, in the Knin region, eastern and

western Slavonia, and Dalmatia [Yugoslavia] is liable for the 'ethnic cleansing' of Croatian citizens from these areas, as well as extensive property destruction -- and is required to pay reparation for the resulting damage."[20]

Some of the findings of the Court relevant to human rights concerns include:

- Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion of 11 April 1949): right of an agent of the United Nations to the protection of the Organization.

- Barcelona Traction Light and Power Company, Limited (Judgment of 5 February 1970): international protection of the fundamental rights of the human person.

- Western Sahara (Advisory Opinion of 16 October 1975): affirmation of the right to self-determination of the people of Spanish Sahara.

- Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion No.95, 8 July 1996): In response to the United Nations General Assembly request for an opinion on the question "Is the threat or use of nuclear weapons in any circumstances permitted under international law?" the Court stated that: "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."

- Gabcikovo-Nagymaros Project (Hungary and Slovakia) (Judgment No, 92, 25 September 1997): A 1977 treaty between Hungary and Slovakia (or their predecessors) committed both countries to the construction of a large dam on the Danube River. In the mid-1980s human and environmental concerns prompted the Hungarian government to suspend and later abandon the project. Slovakia then built a smaller dam within its borders, creating adverse downstream effects. Both countries claimed the other had violated the terms of the treaty. The International Court of Justice avoided consideration of the human environmental impacts of the proposed dam, ruled both countries in violation of the treaty, and ordered them to negotiate in good faith to develop an implementation plan to achieve objectives identified in the 1977 treaty.

3.4. Trends in International Law and Implications Concerning Sovereignty and the Right to a Remedy

The principle of eminent domain has allowed States to appropriate lands from indigenous peoples and ethnic minorities for "public interest" purposes, in many cases dismissing group rights and only compensating those with individual title. For example, in the Aswan project in New Halfa in the Sudan, "the government did not compensate Arab pastoralists coming onto the scheme (other than giving them a tenancy on the scheme) as it felt it did not owe them anything as their land had not been individually registered." Similarly, in the case of Nangbeto in Togo, there was no direct compensation for lost land, as the State claimed ownership of all land (Bartolome et al, 2000:7).

However, in an increasing number of instances, sovereign rights, such as the principle of eminent domain, are being superseded by human rights, especially in cases involving indigenous peoples whose rights are increasingly being recognized by state courts. For example, in Japan where Ainu farmers had their lands appropriated in the 1960s for a dam project that was built without public input or conducting impact assessments, a 1997 ruling by the Sapporo District Court found that the Ainu people were indigenous people entitled to the protection of their distinct culture as stipulated in the International Covenant on Civil and Political Rights (ICCPR) and ILO 169, and therefore the expropriation of Ainu land and approval of the dam project had been illegal. The ruling and the subsequent passage of a 1997 Act regarding the Promotion of Ainu Culture and the Dissemination and Education of Knowledge concerning Ainu Traditions is perceived by Ainu people to be the first stage of redress for the historical injustices imposed on them by the Japanese government.[21]

Frank Biermann, in his 1998 review of the concept of justice in international law[22] finds that recent laws and treaties aimed at protecting the the global climate system and preserving Earth's biodiversity revolve around the concept of a "common concern for humankind." This new legal notion represents recognition that certain global issues affect all and, in developing adequate means to respond, imply a certain restriction of state sovereignty. Biermann argues that in crafting the Montreal Protocol and the Convention on Biodiversity, States have agreed, and thus created a source of law, wherein "individual nations may no longer rely on their sovereignty when the majority of States consider environmental problems as a common concern of humankind that requires effective politics on a global scale" (1998:10).

Biermann notes four norms emerging from the legal concept of "common concerns for humankind" including:

- solidarity (more capable States compensate the full agreed incremental costs of the environmental policies of less capable States);
- participation in decisions (less capable and more capable States have equal powers in the decision-making process);
- differentiation (more capable States accept stricter regulations); and
- restrictions upon sovereignty:- all States accept environmental norms, as long as those have been consented to by all parts of the international community, and other principles have not been violated.

Beirmann notes that even when States are not party to the Montreal Protocol and the Convention on Biodiversity, they may now be forced to obey environmental norms via trade restrictions and other issue-specific limitations without their consent (1998:10-11).

Neil Popovic identifies another significant trend in international law-- concerns with equity have placed greater attention on ways to implement the right-to-a-remedy principle. The Right-to-a-remedy "is a staple of international environmental instruments that the contracting parties recognize their obligation to provide means by which injured parties may exercise their right to a remedy".[23]

The right-to-remedy principle is a central feature of the Arhus Convention on Access to Information, Pubic Participation in Decision-Making and Access to Justice in Environmental

Matters Information and Participation. This convention was developed under the auspices of the United Nations Economic Commission for Europe and opened for signature between June 25, 1998 and December 21, 1998 and signed by 40 parties (European States and regional organizations). The convention reconfirms rights that guarantee access to information and participation in development decision making processes. Recognizing the key role of functioning legal and political systems in implementing these rights, the Convention requires that each signatory establish judicial or administrative proceedings that allow the public to challenge environmental decisions in a fair, equitable, timely, and economically-feasible manner. Thus, the Arhus Convention guarantees access to justice in environmental matters to all persons in signatory States (article 9).[24]

4. IMPLEMENTING RIGHTS: COMPLAINT/REDRESS MECHANISMS

Human rights principles represent the ideals that governments strive for. The right to a remedy, and indeed, the ability to enjoy all human rights, hinges upon the existence of functioning legal and political systems where complaints can be made against the State, organizations, or private entities; whose actions are endorsed by the State without fear of reprisal; and, where effective remedies can be devised (Popovic 1996:563). This section reviews a range of rights-protective mechanisms that allow individuals and groups the opportunity to voice their problems and seek remedial solutions, as well as mechanisms that allow States the means to protect the rights of their citizens.

4.1. United Nations Liability for the Peacekeeping Force

The United Nations, following a 1949 ruling by the International Court of Justice, established a mechanism to provide reparations to those injured while in the service of the United Nations.[25] With the recent expansion of peacekeeping operations, the United Nations has broadened their acknowledged liability to include reparations to private citizens for injuries suffered during United Nations peacekeeping operations. According to a 1998 report issued by the U.N. Secretary General on the third-party claims process, the most commonly encountered damage claims include the non-consensual use and occupancy of property, personal injury, or property damage as a result of normal operations of the force, and injury caused during combat operations.[26] The United Nations bases its responsibility on the doctrine of state responsibility, as applicable to international organizations, in that it is responsible for the unlawful activities of its forces. As such, the United Nations delineates its liability based on the command of the forces. If the forces are under the exclusive control of the United Nations, then the United Nations is responsible for any damage caused that cannot be excused by the doctrine of necessity. If the forces are under national command, then responsibility remains with the nation having control. Determination of responsibility is difficult where there is joint control. These cases are decided on a fact specific basis, but responsibility generally will be determined on the "degree of effective control exercised by either party." Most third party claims against the United Nations have been investigated and settled by a local claims review board, regardless of the size of the operation. Some scholars believe that this opens the door to joint liability apportioned between the U. N. and the State.

4. 2. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC) was established as an organ of the United Nations Security Council in 1991, with the mission of processing claims and paying compensation for injuries caused by Iraq's invasion of Kuwait. The U.N. Security Council established Iraq's legal responsibility for paying compensation by passing Resolution 687 which states: "Iraq.. is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion.... " After the adoption of the resolution, Iraq accepted the terms of the resolution, thereby accepting responsibility. The UNCC is, however, limited to addressing injury to non-Iraqi parties and cannot address claims of Iraqi nationals. Compensation is made available from a fund financed by a percentage of proceeds of Iraqi oil. Development of this fund was inhibited by embargoes on Iraqi oil. However, after the "oil-for-food" swaps began in 1996, the UNCC began to receive sufficient revenue to activate compensation fund. Smaller claims have been largely processed and paid, and the UNCC is now focused on addressing claims for over $100,000.

4.3. ILO 169 Dispute Resolution Mechanism

ILO 169 establishes a dispute resolution mechanism that allows individuals or groups to present complaints against their state in a rights protected forum.[27] As an inter-governmental agency the ILO has no coercive power. The basic principles of ILO's supervisory procedures are dialogue and persuasion. ILO members submit reports to the ILO every five years, and more often if requested, on how it is implementing the Convention both in law and practice. The Committee of Experts on the Application of Conventions and Recommendations, then reviews the situation and makes comments or requests further information from the government. The Committee produces an annual report of its findings. The Standards Committee of the annual International Labour Conference may then invite the government to appear before it to discuss the situation. The Conference Committee's report includes a detailed description of each discussion, and any remaining questions are followed up by the Committee of Experts. The usual effect is that the government reexamines its situation in the light of these comments.

Individuals or groups may petition the ILO Governing Body concerning a convention violation through recognized representative organizations (by a government, a trade union, or an employers' association). This means that indigenous or tribal individuals or organizations, unless they are indigenous workers' or employers' associations, may file rights abuse complaints through trade unions or employers' bodies. Indigenous organizations can send their information directly to the ILO if their communications contain verifiable information - e.g., laws, regulations, or other official documents such as land titles - that the Committee of Experts can use without dealing with questions concerning the standing of a complainant organization. In some cases, the indigenous organizations have been able to persuade an international trade union organization to take up their case in the event that traditional trade unions are not eager to help.

A member nation may also register a complaint with the ILO on the non-observance of a convention by another nation, provided both nations have ratified it. The ILO's Governing Body may also open a complaint on its own motion or at the insistence of a delegate to the conference. Both representations and complaints are investigated, and the results may be published if the situation is not corrected. The ILO often follows up with an offer of technical assistance to help

improve the situation. If satisfactory action is not taken, the ILO continues the examination until the situation is resolved.

In Norway, implementation of ILO 169 included the creation of a Sami Parliament that has gradually assumed a greater role in managing the internal autonomy of the Sami people. The Government of Norway has begun to send its reports on Convention No.169 to the Sami Parliament for comment, and transmits the Parliament's comments to the ILO as part of its own report. The Government has also asked the ILO to open a parallel dialogue with the Parliament, giving the representatives of the Sami people a formal part to play in the supervisory process.

The ILO Convention has facilitated the development of relationships between trade unions and indigenous and tribal peoples. Trade unions have historically been stronger in urban areas and mainly with collective bargaining strategies and the needs of fee-paying members. Rural workers' organizations affiliates have been mainly wage-earning and regularly employed labourers. Conversely, indigenous and tribal peoples are primarily rural or forest dwellers engaged in self-employed or casual labour or tenancy and share-cropping arrangements. Links between these peoples and the labour movement have been traditionally weak. Recently, however, as a result of the rapidly changing employment situation worldwide, trade unions have incorporated in their advocacy agendas environmental and equality issues, including the rights of ethnic minorities, including indigenous and tribal peoples.

Trade unions, through the ILO's supervisory procedures, have brought to the attention of the ILO cases of non-compliance with Conventions No. 107 and 169. For example, the former International Federation of Plantation, Agricultural and Allied Workers (IFPAAW) -- now the International Union of Food, Agriculture, Hotel, Restaurant, and Allied Workers (IUF) -- played a key role in denouncing the harsh treatment that the Adivasi people were undergoing in India (signatory to Convention No.107), as a consequence of the construction of the Sardar Sarovar dam and power project.

4.4. Complaint Forums: Subcommission on Prevention of Discrimination and Protection of Minorities

The Subcommission on Prevention of Discrimination and Protection of Minorities was established by the United Nations Commission on Human Rights in 1949 as a means to undertake studies relating to the Universal Declaration on Human Rights and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities. The Subcommission authorized functions include the performance of “any other functions which may be entrusted to it by the Economic and Social Council or the Commission on Human Rights” and this broad mandate has allowed the Subcommission to extend its consideration beyond problems of discrimination and minorities to include human rights in general.

The nongovernmental membership of the Subcommission sets it apart from other United Nations bodies. Members are elected by the Commission in their personal capacity as experts, not as representatives of States (though candidacies are presented by Governments and elections are governed by rules of geographical distribution). Nongovernmental organizations in consultative

status have the right to participate in the work of the Subcommission, and this participation includes presenting issues and problems to the Subcommission's attention as agenda items in annual meetings, as well as supporting the investigative efforts of Special Rapporteurs appointed by the Subcommission.

Subcommission investigations may be undertaken only if "all available means at the national level have been resorted to and exhausted" (E/RES/1503.6b(i) (XLVIII), 27 May 1970). The Subcommission represents an increasingly important rights-complaint mechanism for indigenous peoples. For example, at its 56 session in April 1999, the Subcommission heard testimony of rights abuse experienced by indigenous peoples from a number of nongovernmental organizations, including representatives of AGIR Group for Human Rights; Society for Threatened Peoples; World Council of Churches; International Educational Development; United Methodist Church; Asian Legal Resource Center; International Federation of Rural Adult Catholic Movements; Transnational Radical Party; World Federation for Mental Health; Franciscans International; Aboriginal and Torres Strait Islander Commission; Inuit Circumpolar Conference; International Organization of Indigenous Resource Development; Latin American Federation of Associations of Disappeared Persons; Worldview International Foundation; Rural Reconstruction Nepal; Commission for the Defense of Human Rights in Central America; Interfaith International; Survival International; Anti-Slavery International; International Indian Treaty Council; International Organization for the Development of Freedom of Education; Association Napguana: International Working Group on Indigenous Affairs; Russian Association of Indigenous Peoples of the North; Latin American Human Rights Association; Indian Movement "Tupaj Amaru"; and Movement against Racism and for Friendship Among Peoples.

Following recommendations of the Subcommission at its 56 annual meeting, the Commission on Human Rights decided to establish as a subsidiary organ of the Economic and Social Council a Permanent Forum on Indigenous Issues, thus creating a permanent place on the annual agenda for indigenous issues.

An example of recent work of the Subcommission is the investigations, findings, and recommendations of the Special Rapporteur on population transfer. According to the Special Rapporteur, unlawful population transfer is defined as "a practice or policy that has the purpose or effect of moving persons into or out of an area, whether within or across an international border, or into or out of an occupied territory, without the free and informed consent of the transferred population or any receiving population." The Special Rapporteur also observed that a people with a right of self-determination have a right to control their economic, cultural and political destiny free of domination by implanted settlers. These findings have been articulated in various reports, resolutions and guidelines of the Subcommission and the Commission, and were again discussed at the February 23, 2000 meeting of United Nations Commission on Human Rights meeting in Geneva with reference to a proposed World Bank financed project--the China Western Poverty Reduction Project moving some 60,000 Chinese into Amdo Province (north-eastern Tibet).[28]

A recent example of a case heard by the U.N. Human Rights Commission is the March 30, 1998 case filed by the the International Peace Bureau on behalf of the Mapuche people denouncing the Chilean government for violations of the rights of persons belonging to national or ethnic, religious and linguistic minorities. The Commission issued a statement of concern and invited

Mapuche leaders to testify at their 1999 meeting. In the ensuing year, increased attention to human environmental rights complaints in Chile was accompanied by an escalation of conflict. Between December 1998 and May 1999, over 100 arrests were made in different Mapuche communities and on repeated occasions police and armed civilian guards beat, threatened and tortured people. Mapuche journalists were imprisoned and had their equipment confiscated. Mapuche lands and resources continued to be confiscated both by the State and by private interests. Mapuche activists filed complaints with the European Parliament, and in April 1999, returned to Geneva to provide testimony to the U.N. Human Rights Commission. On April 19, 1999, Pedro Cayuqueo, secretary of the Co-ordination of Arauco-Malleco Communities in Conflict and a Mapuche leader, was arrested in the Santiago airport as he returned from giving testimony to the U.N. Human Rights Commission. The report presented to the Commission on Human Rights by Cayuqueo includes details on involuntary relocation, illegal deforestation, and environmental degradation on Mapuche lands by the companies including Arauco S.A., Mininco S.A., Volterra Ltd., Shell, Mitsubishi and Amindus among others. These activities occurred in violation of Chilean national law, and with support and protection of some members of the Chilean government. The report also detailed human rights violations, especially in the provinces of Arauco and Malleco where the indigenous communities of Cuyinco, Pascual Cona, Rucananco, Pichiloncoyan and Temulemu had been prevented from freely using public roads and rights of way through land in dispute, illegally detained and tortured by the police. When people organized protests, their leaders and lawyers were arrested and detained.[29]

4. 5. Complaint Forums: Inter-American Commission on Human Rights

The American Convention on Human Rights (Pact of San Jose), signed at San Jose, Costa Rica on 22 November 1969, "recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States reconfirmed the right to compensation in Article 21.2 stating "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in cases and according to the forms established by law."

The Pact of San Jose established an Inter-American Commission on Human Rights, elected from the membership of the Organization of American States, with the capacity and obligation to consider petitions lodged by any person or group of persons, or any nongovernmental entity legally recognized in one or more member States of the Organization, containing denunciations or complaints of violation of this Convention by a State party. The Commission has the power to investigate reports of human rights abuse and to facilitate efforts to achieve a friendly settlement. If a settlement is not reached, the Commission shall develop a report of the facts, state its conclusions, and transmit the report with recommendations to the parties concerned. When adequate measures have not been adopted, the Commission may publish the report, and submit it to the Inter-American Court of Human Rights. Only States Parties and the Commission have the right to submit a case to the Court.

An example of a case involving human rights abuse associated with multinational development activity is the 1990 claim by the Huaorani of Ecuador alleging that oil exploration activities would damage the environment in ways that constitute human rights violations. In the course of

preparing a country report on Ecuador, the Commission sent a delegation to the Oriente to investigate the impact of petroleum development on the human environmental rights of the Huaorani and other Ecuadorian peoples. In the report, the Commission acknowledged States' sovereign right to control exploitation within its borders, but declared that the absence of appropriate regulation of supervision may create serious environmental problems "which translate into violations of human rights protected by the American Convention." The Commission concluded that "Both the State and the companies conducting oil exploitation activities are responsible for [the resulting pollution], and both should be responsible for correcting them. It is the duty of the State to ensure that they are corrected" (IACHR, Country Report: Ecuador 77, 88 (1997:89, 94).

4. 6. Complaint Forums: European Court of Human Rights

The European Court of Human Rights was established by the European Convention on Human Rights. Applications to review human rights complaints may be filed by member nations, or nationals within member nations. When cases are argued before the European Court of Human Rights, in addition to rendering opinions and judgments, the Court has the authority to order damage awards.

For example, in 1988 forty Italian nationals submitted a complaint arguing that Italy had violated the convention in failing to provide the local population with risk factors and emergency preparedness in case of an accident at a nearby chemical factory. The Court concluded in February 1998, that severe environmental pollution may affect individuals' well-being and adversely affect private and family life, and the court held Italy as liable in the failure to secure the applicant's right to respect for their private and family life. The Court awarded each applicant non-pecuniary damages under Article 50 of the European Convention on Human Rights [30]

4. 7. Complaint Forums: African Commission on Human and Peoples Rights

The African Charter on Human and Peoples' Rights, adopted by the Eighteenth Conference of Heads of State and Government at Nairobi, Kenya (June 1981) states "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws (article 14)...All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation (article 21.1,2)... All people shall have the right to a general satisfactory environment favorable to their development (article 24)...

The charter established the African Commission on Human and Peoples' Rights as the primary means for promoting and protection human and peoples' rights in Africa. The Commission membership consists of eleven members chosen for their reputation, morality, integrity, impartiality and competence in matters of human and peoples' rights. Members are nominated by States party to the Charter and elected by secret ballot. The Commission considers

complaints presented by member States as well as complaints submitted by other parties, if a simple majority of Commission members agree. To consider other complaints, communications must indicate their authors (even if they later request anonymity); be compatible with the Charter of African Unity or the Charter on Human and Peoples' Rights; avoid disparaging or insulting language directed against the State concerned; are not based exclusively on news disseminated through the mass media; are sent after exhausting local remedies, if any, unless it is obvious that local remedies are unduly prolonged; are submitted within a reasonable period from the time local remedies are exhausted; and, do not deal with cases that have been settled by States involved in accordance with the principles of the Charter of the United Nations, the Charter of African Unity, or the Charter on Human and Peoples' Rights. In those cases where the Commission confirms the existence of a series of serious or massive violations of human and peoples' rights, the Commission may communicate their concerns to the Assembly of Heads of State and Government, who then may authorize the Commission to undertake an in-depth study, make a factual report, and communicate findings and recommendations to the Assembly.

4.8. Rights Protection and Redress Mechanisms in Domestic Law

Popovic and Jolish (1999:31-56) note that as of 1999, 105 nations have constitutional provisions relating to environmental protection. Of these, 91 constitutions make it the duty of the national government to prevent harm to the environment, and 51 constitutions explicitly recognize the right to a healthy environment. Nineteen constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm. Fourteen constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.[31]

For example, Title II, Article 46 of the Republic of Congo 1992 Constitution provides that "each citizen shall have the right to a healthy, satisfactory and enduring environment" and directs the State to "strive for the protection and conservation of the environment." The Constitution also establishes the obligation to compensate for "all pollution resulting from an economic activity" and such compensation is "for the benefit of the populations of the exploited zones." Other national constitutions stipulating compensation rights include Angola, Argentina, Azerbaijan, Belarus, Brazil, Chechnya, Chile, Costa Rica, Ecuador, Haiti, Krygystan, Marshall Islands, Moldova, Monglolia, Paraguay, Poland, Russia, Spain, Ukraine.

Many constitutions prohibit the taking of private property for public use without just compensation. For example, in the United States Constitution, the Fifth Amendment states "... nor shall private property be taken for public use, without just compensation."

In the Republic of the Marshall Islands, the Constitution codifies customary land rights by prohibiting the private sale of land and stipulating that "No land right or other private property may be taken unless a law authorizes such taking,; and any such taking must be by the Government of Republic of the Marshall Islands, for public use, and in accord with all safeguards provided by law" (Article II, Section 5.1); that "Where any land rights are taken, just compensation shall include reasonably equivalent land rights for all interest holders or the means to obtain the subsistence and benefits that such land rights provide" (Article II, Section 5.5); and, "In determining whether compensation for land rights is just, the High Court shall refer the matter to the Traditional Rights Court and shall give substantial weight to the opinion of the

latter" (Article II, Section 5. 8).

In Colombia, the 1991 Constitution articulates the concept of territorial rights for indigenous peoples and specifies the nature of indigenous rights to self-government and to the management of their natural resources. Indigenous Territories are recognized as territorial entities, on an equal footing with departments and district areas (article 286 of the Constitution), and the rights of land ownership and possession are recognized in the reservas and the resguardos, of which there are reported to be nearly 250. Articles 63 and 329 of the Constitution establish that resguardos are , unseizable and inalienable. The rights of nomadic groups to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, are recognized by the creation of resguardos. The communities or inhabitants of the region, where renewable natural resources are to be found, have priority on the right to exploit them, under the Mining Code. And, article 330 of the Constitution stipulates that any exploitation of natural resources in indigenous territories has to be carried out without damaging the cultural, social and economic integrity of the indigenous communities, and that the Government is to ensure the participation of representatives of the communities concerned in taking any such decisions.[32]

In addition to constitutional provisions, rights protection and redress mechanisms are established through state actions that acknowledge past injustices (for example, loss of land and damage to way of life of indigenous peoples and ethnic minorities) and establishes remedial actions. For example, indigenous land and resource rights are protected in Bolivia with legislation actions and Presidential decrees that recognize indigenous peoples' rights to the surface natural resources of the lands which they occupy or possess. Territories granted to the indigenous peoples of the Eastern lowlands are defined as "inalienable, indivisible, and unseizable" through Presidential Decrees. The Environmental Act of 27 April 1992 guarantees the right of indigenous peoples to participate in the use, management and conservation of the renewable natural resources located on their lands. The Government is required to create the mechanisms and processes to enable these peoples to enjoy this right. It is mandatory to carry out impact assessment studies prior to the implementation of any project which may affect indigenous communities directly or indirectly.[33] And, in Norway, policies established by the Norwegian Ministry of Culture require the regional board responsible for managing crown land in Finnmark to ask the opinion of the Sami Assembly before taking any decision concerning land-use projects. The reindeer herding districts are legally entitled to be consulted, have the right to be compensated, in the event of economic damage, and may bring lawsuits before the courts if they consider a project inadmissible.[34]

Domestic legislation and governmental policy regarding environmental protection often delineate rights and remedial mechanisms associated with natural resource damage. In China, the Reservoir Resettlement Law (1981) requires hydropower stations to allocate 0.0001 yuan per kilowatt hour of power generated to cover costs associated with resettlement. In 1982, the Law of Land Acquisition in State Capital Construction was amended to require the consultation of negatively affected people, to raise compensation rates for land, clarify land title issues, and stipulate protection of incomes and assets of displaced people. Similar changes were instituted in the policies of the Ministries of Electric Power and Water Resources, including compensation of lost assets at replacement costs, and the importance of restoring incomes and addressing needs of ethnic minorities. And, in 1986 China attempted to systematically address the problems

resulting from dam-displacement with a 1,900 million yuan rehabilitation program aimed at improving living conditions of some 5 million reservoir resettled people across 46 resettlement areas in the country.[35]

A review of United States federal policies regarding environmental contamination and natural resource damage found a number of significant points relevant to the issue of reparations for dam-development impacts, including:[36]

- The natural resource damage provisions of the United States Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and the Oil Pollution Act of 1990 (OPA) define "injury" to natural resources and establish procedures for the valuation of damages on the direct and indirect costs for restoring, rehabilitating, replacing, and/or acquiring the equivalent of injured natural resources. The natural resources covered by the rule include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other government- or privately-owned resources covered by CERCLA. Damages may also include the value of the services lost to the public between the time of release (polluting act) and the time the resources and services those resources provide are returned to baseline conditions (i.e., those conditions which would have existed had the release not occurred). Damages are calculated and used as supporting evidence in federal, state, tribal and civil court cases against polluting parties, with awards used to fund remediative actions (such as environmental restoration programs, individual and community compensation for lost wages and income from fishing, and so forth).

- Strategies to determine the damage to biological and human systems as a result of environmental contamination originally developed in conjunction with CERCLA and OPA, have subsequently been applied in a variety of contamination and natural resource damage and loss cases, including dam-related damage to fisheries, and downstream degradation and loss of access to water resources (need to cite these cases). The economic basis by which damages have been awarded acknowledge nonmarket as well as market value of natural resources and are derived from environmental assessments or impact analyses that examine variables such as subsistence living, treaty-protected resources, cultural use of natural resources, sacred sites, community cohesion, and a differential impacts involving a relatively unskilled labor base.

- Authoritative statutes that legitimize sociocultural concerns as a component of environmental impact assessment and the valuation of damages on the direct and indirect costs for restoring, rehabilitating, replacing, and/or acquiring the equivalent of injured natural resources include the United States National Environmental Policy Act (NEPA) and various guidelines for interpreting NEPA. For example, EPA guidelines on Environmental Justice Assessment procedures state “in considering direct, indirect, and cumulative impacts on natural resources, analysts must identify and assess the patterns and degrees to which affected communities depend on natural resources for its economic base (e.g., tourism and cash crops) as well as the cultural values that the community and/or Indian Tribe may place on a natural resource at risk. And, the United States Council on Environmental Quality’s regulations for implementing NEPA require cumulative assessment be included in plans involving environmental remediation and compensation. Cumulative effects refer to those incremental

impacts of an action when added to other past, present and reasonably foreseeable future actions. cumulative effects might include the long term damage of initial action, as well as damages resulting from subsequent actions).

In the United States, and in many other States, compensation for environmental damage has been awarded in numerous court cases, especially cases involving mining and the downstream effects from mining. Compensatory awards have acknowledged direct and indirect damages to natural ecosystems, loss of land and damage to land (including economic, social, and culturally valued land and property contained within), and damages associated with loss of a way of life. In these cases compensation is typically derived from economic estimates of specific goods and activities, and by no means equates the full value of what has been lost.

Increasingly, a number of States have established legislation or policy that extends the rights enjoyed by their own citizens, to the foreign beneficiaries of their development assistance. For example, in 1992 Australian Environmental Minister Ros Kellt signed an agreement with the Ministry for Trade and Overseas Development that applies the principles of the nation's Environmental Protection Act to all foreign development programs. Environmental Impact Statements are required for all forms of international assistance.[37]

4. 9. Other Relevant Complaint and Redress Mechanisms

4.9.1. Alien Tort Claims Acts

While international organizations may be considered actors under international law, the responsibility to insure organizational compliance has generally been a duty of the State. However, the ability or will of the State to insure organizational compliance can be compromised when the State is a partner in development project and economic profits conflict with socioenvironmental responsibilities. Thus, in a growing number of cases, national law is being used in an effort to sue multinationals in their home base countries. Also, an increasing number of international treaties have included responsibility provisions that make transnational corporations directly liable for their transgressions of international law, including environmental and human rights abuses.[38]

4.9.2. World Bank Inspection Panel

The World Bank Inspection Panel is a fact-finding body that operates on behalf of the Board to investigate the performance of the Bank and not the borrower. The Inspection Panel was established by Resolution of the Board in 1993 and its operating procedures have been revised twice, most recently in April 1999 (summarized below). The stated purpose of the Inspection Panel is to review available material and determine whether there is a serious Bank failure to observe its operational policies and procedures with respect to project design, appraisal and/or implementation.

In its review process, the Inspection Panel examines only those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies and procedures. In assessing material adverse effect, the without-project situation is used as the base case for comparison, taking into account what baseline information may be

available. Non-accomplishments and unfulfilled expectations that do not generate a material deterioration compared to the without-project situation are not considered a material adverse effect. To submit a request for inspection to the Panel, the following technical criteria must be met:

- The affected party consists of any two or more persons with common interests or concerns and who are in the borrower's territory (Resolution para. 12).
- The request does assert in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester (Resolution paras12 and 14a).
- The request does assert that its subject matter has been brought to Management's attention and that, in the requester's view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank's policies and procedures (Resolution para. 13).
- The matter is not related to procurement (Resolution para.14b).
- The related loan has not been closed or substantially disbursed (Resolution para.14c).
- The Panel has not previously made a recommendation on the subject matter or, if it has, that the request does assert that there is new evidence or circumstances not known at the time of the prior request (Resolution para.14d).

Once an Inspection request has been filed, World Bank Management is required to develop a response to the request for inspection. The response provides evidence of compliance with relevant Bank operational policies and procedures; or, acknowledges that serious failures attributable exclusively to its own actions or omissions in complying, but provides evidence that it intends to comply with the relevant policies and procedures; or, provides evidence that serious failures that may exist are exclusively attributable to the borrower or to other factors external to the Bank; or, indicates that the serious failures that may exist are attributable both to the Bank's non-compliance with the relevant operational policies and procedures and to the borrower or other external factors. When Management determines that serious failures are attributable exclusively or partly to the Bank, it must then provide evidence that it has complied or intends to comply with the relevant operating policies and procedures.

The Management response only contains those actions that the Bank has implemented or can implement by itself. Management may work with borrowers and affected people to develop remedial efforts (“action plan”). In the event of agreement by the Bank and borrower on an action plan for the project, Management will communicate to the Inspection Panel the nature and outcomes of consultations with affected parties on the action plan.

The Inspection Panel develops a report with its recommendation based on the information presented in the request, Management’s response, and on other documentary evidence. The Panel may decide to visit the project country if it believes that this is necessary to establish the eligibility of the request, and only by government invitation. After the Panel completes its inspection and submits its findings, Management reports to the Board any recommendations it may have. The Inspection Panel may evaluate whether the Bank's compliance or evidence of intention to comply is adequate, and reflect this assessment in its reporting to the Board. The Panel may also submit to the Executive Directors a report on their view of the adequacy of consultations with affected parties in the preparation of the action plans, but may not submit

views on other aspects of the action plans, nor monitor the implementation of the action plans [39]

4.9.3. IFC/MIGA Office of the Compliance Advisor/Ombudsman

In late 1999, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) established the Office of the Compliance Advisor/Ombudsman. This office is meant to receive and explore the environmental and social concerns voiced by people affected by projects financed or insured by IFC and MIGA. The Ombudsman is a full-time employee of the IFC and MIGA, hired at the Vice-President level, and supported by an assistant. The office includes a budget to recruit consultants or constitute expert panels for audits or independent reviews of controversial projects.

The role of the Ombudsman includes advising and assisting IFC and MIGA in dealing with sensitive or controversial projects, either at the request of the President or IFC's or MIGA's management or on the suggestion of the Ombudsman; assist in efforts to respond to complaints from external parties affected by IFC or MIGA projects; investigate complaints, as appropriate, in consultation with affected parties, project sponsors, and IFC's or MIGA's management, with the goal of correcting project failures and achieving better results on the ground; directly communicate with complainants and affected parties, while respecting the confidentiality of sensitive business information; report on his/her findings and recommendations to the President, who will determine what actions are required; and, make recommendations to the President regarding to what extent and in what form the findings will be disclosed to the IFC or MIGA Board of Directors, affected parties and the public. The Office of the Compliance Officer will supervise audits of IFC's and MIGA's overall environmental and social performance and sensitive projects, in order to ensure ex-post compliance with policies, guidelines, and procedures. Audits would be carried out with assistance of outside experts, either on a case-by-case basis or in accordance with a regular program. The Compliance Advisor/Ombudsman will also provide advice to management on environmental and social policies, procedures, guidelines, resources and systems established to ensure adequate review and monitoring of IFC and MIGA projects; and, provide advice at the request of IFC's or MIGA's environmental and social staff on specific project issues.[40]

5. REPARATION CASES

This section of the paper reviews the record of reparations, beginning with examples of reparations for damages and atrocities resulting from conflicts between States. Cases mentioned here include reparations associated with World War II. Also reviewed here are reparations cases for damages resulting from actions within States-- including those involving the violation of civil, political, economic and cultural rights of ethnic minorities and indigenous peoples; violations of treaty rights between the State and sovereign nations residing within; and, violations of trust responsibilities between the State and trust territories. In the majority of cases, the responsibility to provide reparations were articulated in cease-fire treaties. In recent years, an increasing number of reparations cases are damage awards or settlements associated with class-action suits filed in U.S. and international courts. Some of these reparations cases involve damages resulting from violations of contractual obligations including, for example, violations of treaty rights established between Native American groups and the United States government.

Other reparation cases involve damages resulting from violations of international law, especially human rights law. These examples illustrate that reparations emerge from a number of political processes including

- negotiations accompanying agreements to end bilateral or multinational conflicts;
- negotiations accompanying agreements to end internal State conflicts;
- judgments and awards in federal and international courts;
- out of court settlement negotiations following the filing and hearing of court cases in federal and international court settings.

5.1. Record of Reparations: restitution for violations of the customary rules of warfare

The record of reparations largely consists of reparation for damage resulting from aggressive conflicts between States, a great number of which involve war crimes committed during World War II. The record of reparations from the German government for World War II war crimes, for example, include reparations settlements negotiated by governments on behalf of holocaust victims in the years immediately following World War II, as well as a host of reparations settlements negotiated in the years since World War II, on behalf of uncompensated victims. The 1946 Paris Reparations Agreement charged the United States, United Kingdom, and France with the obligation of recovering any German assets held in neutral countries and handing these assets over to an international agency that would pay out the assets to Holocaust victims that needed aid but did not have a national government to assist them. The assets of any heirless Holocaust victims were to be made available to assist refugees. (The allies later made similar individual agreements with the neutral countries, including Switzerland).

Recently, the German government agreed to a settlement with the United States creating a three million German mark fund to compensate victims who were U.S. citizens at the time they were persecuted and who had not yet received any payments for compensation. The settlement excludes persons who were subjected to forced labor while not in a concentration camp and contains a clause to provide for further negotiations after two years to determine whether there are more U.S. nationals meeting the criteria for compensation.

And, as of May 2000, the German Government is close to completing an accord with the U.S. government establishing a fund to compensate WW II slave laborers (the agreement is expected to be signed by mid-June 2000). In 1999, the German, United States and east European countries, German corporations, and representatives of former slave laborers agreed to a 10 billion- deutsche marks settlement, with the German government contributing 5 billion marks, and German companies with more than 10 employees contributing the other 5 billion marks. By May 26, 2000 an estimated 2300 German companies had contributed 3 billion deutsche marks, including donations from companies founded after World War II.[41]

Swiss Banking Industry also paid reparations to holocaust victims by transferring millions in funds to allied nations to assist war refugees. Switzerland's banking industry received during the war gold from the Reichsbank treasury and money or assets taken from Holocaust victims. During the war, the allies were aware of the German assets in Swiss Banks and requested identification. The United States also negotiated with Switzerland to halt trade with Germany and reveal hidden assets. In 1946, Switzerland agreed to transfer $60 million in gold in exchange

for the Allies' agreement to drop any future claims on German assets. After years of dispute and protracted negotiations, Switzerland delivered $34 million in 1952. Dormant accounts were not directly addressed in this settlement and the only reference was in a side letter that the Swiss Banks would attempt to identify Swiss-held property of heirless victims. The Swiss did not take action on dormant accounts until 1962, after pressure from individuals and Jewish NGOs. After passing a resolution to create procedures for the determination of heirs and transferring of assets, the Swiss banks turned over 7.5 million Swiss francs held in 961 accounts to claimant heirs and another 2 million francs to communities and a refugee organization.

In the mid-1990s, "Nazi" wealth in Swiss banks was identified by NGOs and the press, and new claims against Swiss banks were filed in the U.S. and Europe. Three major Swiss banks announced in February 1997 the creation of a $70 million fund to benefit Holocaust victims. That same year, the Swiss government was able to identify another 775 dormant accounts holding almost $32 million. In 1999, several Swiss banks agreed to pay $1.25 billion to a class of plaintiffs composed of heirs of Holocaust victims who had opened accounts before their deaths. The settlement grew out of a class action suit filed in federal court in Brooklyn, New York in October 1996. The plaintiffs included Holocaust survivors and their heirs and sought a $20 billion recovery under six causes of action: breach of contract, accounting, breach of fiduciary duty, conversion, conspiracy, and unjust enrichment. When the banks were unable to get the case dismissed, they made an initial offer of $600 million to settle the case. The plaintiffs refused before finally reaching the $1.25 billion agreement.[42]

Other examples of war-related reparations include apologies and compensatory payments from the United States to the 120,000 people of Japanese ancestry who were forced to abandon their property and reside in federal internment camps during World War II. In 1948, the Japanese American Evaluation Claims Act provided funds to pay claims for real and personal property losses. Some $38 million has been paid under this Act. In 1988, as part of the Civil Liberties Act, U.S. Congress established a $1.65 billion restitution program authorizing reparations of $20,000 for hardship and indignity experienced by some 60,000 eligible persons of Japanese ancestry who were forced to relocate to internment camps from March 1942 to January 1946.

The 1988 Civil Liberties Act also provided some $12,000 each to 450 surviving Aleutian islanders who were removed from their homeland by the U.S. Navy in 1942 and relocated to abandoned canneries and mines in southern Alaska for three years. An additional $1.4 million was authorized to establish a trust fund to be used for health education, cultural preservation, community development, and other projects meant to improve the condition of Aleut life. Another $15 million was allocated to compensate for the loss of Attu Islands which had been used as a Coast Guard station during and after the war and was designated as a wilderness area in 1980.

In 1996, people of Japanese descent from Latin American countries filed a class action suit against the U.S. for being forcibly taken from their homes in 13 Latin American countries, placed in U.S. internment camps, and used as hostages by the United States. More than 800 of these people were sent to Japan in prisoner exchanges during World War II. This claim was settled in 1998, the terms of which included a letter of apology and $5000. Negotiations continue on behalf of some 2000 who felt the settlement and letter of apology were inadequate and U.S. Congress is currently considering a reparations bill that seeks official apologies, establishes a $45

million educational program about the internment, and allocates $55 million to cover $20,000 compensation awards to Japanese Latin Americans and others not covered in the earlier restitution program. [43]

5.2. Reparations for Crimes of the State Against its' Citizens

Mongolia

In addition to war crimes, an increasing number of reparations cases involve crimes of the State against its citizens. For example, Mongolia's government has established a reparations program for repression victims and their decedents who suffered as a result of rights abuses committed between 1921-1990, when Mongolia was a satellite state of the Soviet Union. Tens of thousands of people were tortured and killed over the years. In 1936 some 29,800 people were executed, of which 17,000 were Buddhist lamas. Of the 100,000 lamas in Mongolia in 1920, 80 survived in 1990. The Mongolian government reparations program includes efforts to document and acknowledge historical crimes, and compensation awards to victims and their families amounting to an equivalent of $925 apiece (annual per capita income in 1997 was $395). [44]

South Africa

The South African Truth and Reconciliation Commission (TRC) is based on the Promotion of National Unity and Reconciliation Act, No 34 of 1995, and is meant to address human rights violations perpetrated by the South African government and opposing parties between 1960 - 1994.[45] The TRC effects its mandate through 3 committees: the Amnesty Committee, Reparation and Rehabilitation (R&R) Committee and Human Rights Violations (HRV) Committee. The task of the HRV Committee was to investigate human rights abuses that took place between 1960 and 1994, based on statements made to the TRC. The Committee established the identity of the victims, their fate or present whereabouts, and the nature and extent of the harm they have suffered; and whether the violations were the result of deliberate planning by the State or any other organization, group or individual.

Once victims of gross human rights violations are identified, they are referred to the Reparation and Rehabilitation Committee. The enabling act empowered the R&R Committee to provide victim support to ensure that the Truth Commission process restores victims' dignity; and to formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and communities at large. In testifying before the TRC, victims gave up their right to pursue civil claims because the perpetrators were granted amnesty. The South African Constitutional Court ruled that amnesty could be granted by the Truth and Reconciliation Commission because reparations, be they broad or specific, would be made available.

In October 1998, the South African Truth and Reconciliation Commission (TRC) handed over its reparations proposals to the South African government, identifying some 18, 000 victims who testified before the Commission and were deemed eligible for reparations. Recommendations included a range of reparation strategies for individuals and communities including better access to health-care and job creation schemes for communities, and one-time payments and longer-term grants spread over six years for individuals. The TRC also recommended symbolic reparations (erecting headstones, monuments, and renaming public facilities). At that time, the South African government announced that urgent interim awards for the first 1000 victims would be paid. A President's Fund, funded by Parliament and private contributions, was established to

pay urgent interim reparation to victims in terms of the regulations prescribed by the President. The Commission is currently in suspension while the work of the Amnesty Committee is completed. The remaining work of the R&R and HRV Committees has been designated to the former chairs of those Committees, and now forms part of the Amnesty Committee. Further action by the government on TRC reparations recommendations has been hindered by a lack of funds.

Chile

In reviewing the controversies surrounding reparations for victims of apartheid in South Africa, Brandon Hamber argues that developing nation status should not, in itself, hamper efforts to implement Truth and Reconciliation reparations recommendations. Hamber observes that Chile, a nation of similar size and resources, provides reparations for the children of those killed during the military dictatorship of Pinochet (a monthly pension until they reach 25 years of age), and for rest of the beneficiaries, the pension is for life. The monthly pension is between South African R1,400 and R2,000 for the family of the deceased depending on the number of dependents. About 800 scholarships a year are also granted to the families of victims. Victims also get free medical and psychological care. The fiscal burden of the comprehensive reparation program, including scholarships and medical aid is about R120 million per year.[46] This compensation program (administered by the National Corporation for Reparation and Rehabilitation) was established by Chile's Commission on Truth and Reconciliation which recognized three aspects to reparations for the victims of state torture, murder and disappearances: disclosure of truth, recognition of the victim's dignity and pain suffered by their relatives, and measures to improve the quality of their lives [47]

5. 3. Reparations for State Violations of Trusteeship Responsibilities

International trusteeships, established by United Nations Charter, were meant to "promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self government or independence."[48] Trustee relationships between the State and domestic dependent nations have been acknowledged and confirmed in constitutions, treaties, and enabling legislation. Trust relationships represent an enforceable legal acknowledgement by the State that it has taken what once belonged to trustees (native, indigenous, aboriginal) peoples and now agrees to protect what they still retain.[49] Trust relationships involve a fiduciary relationship, where the State is legally bound to "act for the benefit of the other while subordinating one's personal interest."[50] Under United States law, inhabitants of a trust can sue to enforce their treaty rights. Similarly, the International Court of Justice has ruled that inhabitants of an international trusteeship can sue for violations of substantive rights and duties established in Trusteeship Agreements.[51]

In the United States, reparations cases for damages resulting from violations of trusteeship responsibilities have emerged both as a result of lawsuits (settlements before court rulings, or awards resulting from court rulings), and as a result of political negotiations fueled by public perception of legal violations and political necessities of regaining positive public image. Examples are described below.

5.3.1. Reparations and Nuclear Testing in the Marshall Islands[52]

The United States established a military presence in the Marshall Islands during World War II. In 1946, the United States approved plans to test nuclear weapons in the Marshall Islands, and in 1947 the United Nations formally designated the Marshall Islands as a trust territory of the United States. The United States Nuclear Testing Program operated in the Marshall Islands from 1946 through 1958 during which time atomic and thermonuclear weapons were detonated with the aim of achieving world peace through a deterrence policy. Atmospheric testing demonstrated military might, but also inflicted nuclear war conditions on a fragile atoll ecosystem and a vulnerable population. The Marshallese, despite appeals to the United Nations, were powerless to stop the testing and unprepared to address the proliferation of problems resulting from the testing.[53] Nuclear testing destroyed the physical means to sustain and reproduce a self-sufficient way of life for peoples living in the northern atolls, and produced great hardships for the nation as a whole. Radioactive contamination and involuntary relocation radically altered health, subsistence strategies, sociopolitical organization, and community integrity.

Between 1946 and 1982, the United States allocated an estimated $250 million for their Departments of Defense, Energy, and the Interior activities in the Marshall Islands, including the costs of rehabilitation and resettlement services, health care, and monitoring of islanders exposed to radioactive fallout. Much of these funds covered the costs of human ecological research to understand the movement of radiation from the weapons tests, into the environment, and ultimately into the human beings that lived in highly contaminated environments.[54] Actual compensation measures taken by the United States during this same period total some $50 million.[55]

In 1983, the United States and the Marshall Islands established a Compact of Free Association (approved by United States Congress in 1986), and the Marshall Islands became an independent nation. In Section 177 of the Compact of Free Association, it states that:

> The Government of the United States accepts the responsibility for compensation owing to the citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946 and August 18, 1958. [56]

Section 177 of the Agreement outlines United States responsibility for the consequences of the Nuclear Weapons Testing Program and provides $150 million to the Republic of the Marshall Islands to create a trust fund for addressing the past, present, and future claims arising from the testing program. This fund was expected to generate $270 million in interest income over the 15 years of the Compact. The Republic of the Marshall Islands agreed to espouse all legal proceedings related to the testing program pending in U.S. courts; and, the Republic of the Marshall Islands agreed to establish a Claims Tribunal to make final determinations on all claims relating to the weapons testing program. From the $150 million provided by the United States, $45.75 million was set aside for the Claims Tribunal to make awards. Distributions from the fund are also made to the people of Bikini, Enewetak, Rongelap, and Utrik for purposes including medical care. The Tribunal also covers the costs of research and studies to support or defend compensation claims. Funds for medical surveillance and radiological monitoring made available under section 177 were exhausted by 1995

The independent claims tribunal in the Marshall Islands, the Nuclear Claims Tribunal, was established in 1988. The Tribunal consists of three judges, the Chairman is from the Marshall Islands and the two other judges are from the United States. In establishing the Tribunal, two other positions were created-- the Public Advocate, who works with claimants to bring their claims before the judges, and the Defender of the Fund, who protects the interests of the corpus in making sure that it is not wrongfully distributed. Damages from the Nuclear Weapons Program are recognized by the Nuclear Claims Tribunal as falling into two categories: personal injury, and property damage. Claimant criteria were established for personal injury (and include 35 radiogenic injuries that the Tribunal recognizes as compensable). For property damages, any individuals, groups, local governments, or the national government have the right to present information to the Tribunal demonstrating land damage and the loss of use as a result of the testing program.

As of March 31, 2000, the Tribunal has awarded $71 million in personal injury compensation to 1,671 individuals, additional personal injury claims are still pending, and the Tribunal may receive new claims for as many years as the Tribunal will operate.

In April 2000 the Tribunal made its first decision and order for property damage with its $341 million award for the Enewetak class action claim for damages to land as a result of the Nuclear Weapons Testing Program. In December 1947, the United States Navy moved 145 people from Enewetak to a barren, resource-poor Ujelang Atoll where they lived for 33 years. Some 43 nuclear bombs were detonated in and above Enewetak. The Nuclear Claims Tribunal has already allocated compensation for individual injuries. In this land claim award, the Tribunal ruled that the Enewetak people who lived on Ujelang at any time during the period of relocation should be compensated for hardship associated with involuntary relocation and loss of use of customary lands ($34,084,500), for the economic value of lost income from past and future loss of land ($199,154,811) and for costs to restore, including costs associated with long term environmental monitoring, remediation, and ecological rehabilitation of lands harmed during the trusteeship period ($91,710,000).[57] Pending land claims for Bikini, Rongelap and Utrik Atolls will help further define the scope of property damage in the Republic of the Marshall Islands as a result of the Nuclear Weapons Testing Program.

With only $45.75 million available for actual award payment, the Tribunal does not have sufficient funds to cover personal awards, let alone property damage. To date, the Tribunal has paid partial payment to all 1,671 personal injury awardees (in amounts of 25%, 45% or 63%, depending on when the award was made). The latest review of deceased awardees shows that 702 of those 1,671 awardees (42%) are now deceased.

In addition to awards provided directly by the Compact of Free Association and the 177 Agreement, U.S. Congress has made additional awards to the islanders, citing the obligations established in the Compact. In 1988, the Bikinians received an additional $90 million to fund the trust fund established in the Compact. In 1994, Congress awarded the people of Rongelap a $40 million resettlement trust fund. These various awards represented actions under the United States' obligation to remedy damages (e.g., project specific allocations for remediation or resettlement) and established mechanisms to implement remedies (such as the establishment of trust funds to manage allocations).

However, with these payments the United States' obligation to remedy damages associated with nuclear testing has by no means been extinguished. Included in the Compact is a "changed circumstance" clause that allows the RMI to petition Congress to provide additional funding and assistance.[58] In the years since the initial Compact was signed thousands of documents have been declassified demonstrating a much broader area of contamination and greater numbers of affected people. Also, since the Compact of Free Association was first crafted, scientific research has further demonstrated a wide range of health risks associated with low level radiation exposure, including the cumulative effects of low-level exposure over time. Thus, the RMI government is in the process of finalizing its first changed circumstance petition to congress, demonstrating a much greater area of radioactive contamination, and much greater injury to people and the environment.

5.3.2. The Zuni Tribe v. The United States.

On May 27, 1987, The Zuni Tribe of New Mexico V. The United States was filed in U.S. Claims Court. The claim stated that Zuni land was taken without compensation when the U.S. acquired the land from Mexico. The case began by interviewing Zuni elders to document traditional land use. Information from the oral histories was corroborated by scientific and historical documents. Contested issues included whether the Zuni claim to a large area of land and resources contained within could be substantiated lacking individual title and based on a record of subsistence oriented use; and whether damages could be awarded for injuries and loss of a sustainable a way of life. The tribe "... demonstrate[d] how Zuni land use involved a core area of permanent and seasonal settlements, where agriculture was intensively practiced, surrounded by a larger sustaining area...with extensive grazing, hunting, and gathering of numerous plants and minerals." The court ruled in favor of the Zuni recognizing that lands were taken by the U.S. Government without adequate compensation.[59]

Court findings include:

- The claim area consists of diverse physical landscapes and varied environments and resources...The Zunis made use of resources from every part of their environment within the claim area...Geology, land forms, drainage, precipitation, temperature, and biotic communities all vary from place to place within the claim area, and the availability of many critical resources varies from year to year as well. This environmental variability requires an extensive and flexible land use system, so that if a particular resource is not available at one place when it is needed it can be obtained elsewhere (p. 245)...

- Traditional Zuni land use involved a core area of permanent settlements where agriculture was intensively practiced, a larger surrounding area containing seasonal settlements...and a more expansive surrounding area where animals were hunted, and plants, minerals, and other items were gathered ...traditional Zuni land use system...enabled the Zuni people to be self-sufficient and to produce surplus agricultural goods and other commodities obtained by hunting and gathering for trade (p. 267)...

The ultimate finding of the court was that "This entire claim area was used by the Zuni for one purpose or another including: habitation...and life-sustaining activities including farming, hunting, grazing, gathering, and religious worship (p. 277).[60]

The result of the Court's finding was "The Zuni Land Conservation Act of 1990" p. L.101-486. In this Act, the Zuni and the U.S. Department of Interior are instructed to formulate a Zuni resource plan for:

- a methodology for sustained development of renewable resources;
- a program of watershed rehabilitation;
- a computerized system of resource management and monitoring;
- programs for funding and training of Zuni Indians to fill professional positions that implement the overall plan;
- proposals for cooperative programs with the Bureau of Indian Affairs and other private or public agencies to provide technical assistance in carrying out the plan; and
- identification and acquisition of lands necessary to sustain Zuni resources development.

Congress established a $25 million trust fund to formulate and implement the plan. Portions of the trust are also set aside to pay outstanding debts of the Tribe, to construct a public elementary school and increase educational opportunities, and to purchase land for the community. It was recognized that this action is essential to "the preservation of the Zuni history, culture, tradition, and religion..." (Boyden, 1995: 225).

Findings in the Zuni case reinforce earlier court rulings on Native American claims which recognized that compensation for material losses experienced by individual property owners does not adequately encompass the corporate losses experienced by a group whose way of life revolves around subsistence oriented use of natural resources. Social science analysis played a critical role in these cases by providing the documentation of long-term damage resulting from the loss of the natural capital that sustained cultural groups and their way of life. For example, when the Southern California Soboba band of Mission Indians went to court to claim compensation for damages from lost water resources, economist Raul Fernandez used ethnographic material compiled by anthropologist Joe Jorgensen to demonstrate that impoverishment and sociocultural disintegration was linked to the building of the Colorado River aquaduct, when tribal water resources began to dry up and eventually disappear. Compensation had been initially offered to individual landowners, and this was contested as inadequate by the tribe. Fernandez detailed the socioeconomic implications of lost water resources, and his work supported the Tribe's efforts to restore water and receive restitution for the entire tribe. The court found that the tribe as a whole had experienced damage from the loss of "natural capital" represented by naturally-occuring water resources on their reservation. Court rulings acknowledged that compensation to individuals for the loss of water and agricultural production did not adequately compensate for broader sociocultural losses. Damage awards included funds to support social reconstruction of the Soboba community. [61]

5.3.3. Grand Coulee Dam, Columbia River United States[62]

The Grand Coulee Dam is located in eastern Washington State on the Columbia River, the fourth largest river in the United States. Grand Coulee Dam and the Columbia Basin Project were built in 1933 as projects meant to promote jobs and low electricity rates. Subsequent work began in the mid-1960s and was completed in 1975, during which time the dam was heightened to provide flood control, irrigation and recreation. Water diversions from Lake Roosevelt (the reservoir of

the Grand Coulee Dam) are channeled to a series of dams, reservoirs and canals to irrigate the semi-arid Columbia Plateau. Revenue from the dam's power generation subsidizes irrigation water for Plateau farms.

Construction of the Grand Coulee Dam displaced an estimated 3,000-4,000 non-indigenous people, 1,500 Colville Indians and 100-250 Spokane Indians. Neighboring Nez Percè, Coeur d'Alene, Warm Springs and Yakima tribes were also affected. Displaced peoples received inadequate compensation for land and goods, and no financial support or assistance for resettlement. Many inhabitants of submerged towns were relocated to areas lacking basic utilities such as a water source, public telephones and electricity. Some rejected the government's compensation offers as being too low, and the government responded by condemning their land to obtain the title. Subsequent efforts in court to secure just compensation were not successful. Native Americans objected that white affectees received compensation before they did. And, they objected to failures to live up to compensatory promises, such as the promise from Secretary of the Interior Harold Ickes to the tribes that they would receive a share of hydroelectric power revenues. Dam construction hampered inter-tribal communication: it created a physical barrier impeding access to other tribes' reservations where they had previously gathered healing plants. The displacement of tribes also resulted in the loss of sacred sites. Many tribal burial sites were flooded when Lake Roosevelt was filled, and graves have been exposed by fluctuating water levels.

The most severe loss caused by Grand Coulee was the decline in native fish populations on which the Native American tribes relied heavily. The Columbia River has five species of salmon (chinook, coho, sockeye, pink and chum) and two species of trout (steelhead and sea-run cutthroat), in addition to indigenous fish species. Most severely affected were those species that swim far upstream to spawn (chinook, steelhead and sockeye), as Grand Coulee was constructed without fish runs. The dam generated high concentrations of dissolved gas which contributed to the decline in fish stocks. Before construction of the dam, estimated anadromous fish stocks were 2.2 million (25,000 in the upper Columbia). The loss of fish resulted in the loss of the tribal way of life. The decline in salmon population also resulted in the loss of cultural ceremonies that facilitated communication within and between tribes. Canadian First Nations were also affected by downstream dam construction. Grand Coulee cut off all fish supplies to the lands of the Ktunaxa, Shuswap, and Lakes-Sinixt tribes. Several fish subspecies died out and tribal members had to move elsewhere. The dams constructed in Grand Coulee's wake (Duncan, Keenleyside and Mica Creek) adversely affected Canadians through loss of land and forest resources, and disruption of agriculture, recreation and fisheries.

When the State of Washington received the original preliminary permit for the Grand Coulee and Columbia Basin Project, the Native American tribes, fearing damage to fish populations, protested the dam, as they had done for another dam proposal ten years before. Under the 1920 Federal Power Act, Washington would have had to compensate Native Americans for loss of tribal lands, and ensure salmon survival by building fish passages and ladders in the dam. However, the dam project was transferred from the state to the federal government, and the transferal of authority removed tribal rights to file damage claims against the proposed project. Despite treaties between the U.S. and tribal nations that state otherwise, the federal government asserted that the Indians had no greater legal claims to fish than anyone else.

In 1939, the U.S. federal government established the Grand Coulee Fish Maintenance Program, which focused on maintaining quantity, but not quality of fish. The value of the fish was calculated at its commercial worth, rather than addressing the needs of Native American populations. There was no attempt to preserve the genetic makeup of specific runs, and little attempt to preserve the genetic integrity of the species. Egg supplies were frequently mixed in hatcheries, resulting in lower grade stock. Captures of adult fish for the program wreaked havoc on the Colville tribes' downstream fisheries. The program entailed trapping fish runs at Rock Island Dam downstream of Grand Coulee, and transporting them to four tributaries (Wenatchee, Entiat, Methow, and Okanogan) for natural propagation, and three hatcheries (Leavenworth, Entiat, and Winthrop) for artificial propagation. The natural propagation was more successful. The program was taken over by the United States Fish and Wildlife Service in 1945 and came under the Bureau of Reclamation once again in 1994. Today, populations remain relatively stable.

In 1951, the Colville Confederated Tribes filed suit against the United States. The suit was divided into two cases by the Indian Claims Commission. Docket 181C contained claims for the loss of fisheries and the elimination of salmon run populations as a result of dam construction. Docket 181D covered compensation for annual power share revenue from tribal land that had been promised to the tribes. In 1978, the Commission ruled on Docket 181C that the United States government was obliged to guarantee tribal fishing rights. The tribes were entitled to reparations for the difference between the fish they were able to catch between 1872 and 1939, and the value of what their normal subsistence catch would have been. This reasoning produced an award of only $3,257,083, which did not include damages. In Docket 181-D, after two federal court rulings in 1990 and 1992 (20 Ct.Cl 31; 964 F.2nd 1102), the United States and the tribe negotiated a settlement. This was the first time the United States provided partial compensation to the tribe for the damages suffered from the dam. The tribe received a $53 million lump sum settlement for previous years, from funds appropriated by Congress in 1944. That money was distributed per capita, with each tribal member receiving $5,937. The act also provided that thereafter, the Bonneville Power Administration (BPA) would make annual payments to the tribe of approximately $15 million.

The Spokane tribes did not pursue a claim in court. In 1999, U.S. Congressional representatives from the State of Washington filed legislation to pay annual amounts to the Spokane equal to 39.4% of that paid to the Colville tribes. The Yakima, Nez Percè, Umatilla and Warm Springs tribes filed suit in State courts against Oregon (United States vs.Oregon, 302 F.Supp. 899, 1969) and Washington (United States vs Washington, 384 F.Supp. 312, 1974) to assure tribal fishing rights with minimal state regulation. Under these rulings, the treaty tribes were entitled to 50% of harvestable fish destined for traditional fishing areas. In addition, the States' conservation measures and other regulations had to be managed in such a way that an equitable share of fish would reach the upstream tribal fisheries.

At present, the Bureau of Reclamation funds the Colville and Spokane tribes' relocation of burial sites that have become exposed due to fluctuating water levels. However, neither the National Park Service nor the Bureau of Reclamation have taken ultimate responsibility for the devastation many tribal members feel regarding the disturbing of their ancestors gravesites. There have been no measures to compensate Canadian First Nations for loss of fish or way of life. Canadian First Nations requests for reparations emphasize the need to restore depleted

salmon populations.

5.3.4. Native American Tribes, Pick-Sloan Dams and the Missouri River Trust

Thousands of acres belonging to The Lower Brule, Crow Creek, Cheyenne River and Standing Rock Sioux, Mandan, Hidatsa and Arikara tribes were lost to the Pick-Sloan federal dam projects built in the 1950s on the Missouri River. Over the past few years, because a number of dams are silting up, towns and communities down stream have experienced significant flooding. The resulting damage to homes and businesses prompted U.S federal interest in reducing flood risks and Congressional support of funding for restoration. This process led to a reexamination of tribal and state complaints concerning the original appropriation of lands without just compensation. In 1999 Congress approved legislation returning federal land along the reservoirs to the state and to the Lower Brule and Cheyenne River tribes. That legislation also creates separate trust funds that eventually will reach $108 million for the state, $42.4 million for the Cheyenne River reservation and $14.9 million for the Lower Brule. Interest from those funds will be used to manage and improve recreation and wildlife habitat. And, in March 2000, U.S. Congress established a $200 million Missouri River Trust Fund as partial compensation for land lost to federal dams. The Trust Fund will be used to help control silt and erosion, improve recreation, and protect cultural sites along the river. When fully realized in 11 years, the fund will provide $12 million a year in interest for work primarily in South Dakota. The legislation also sets up a 25-member board to oversee spending from the fund. Fifteen members will be appointed by South Dakota Governor and 10 would be from American Indian tribes -- including nine in South Dakota and North Dakota's Three Affiliated Tribes. Legislation that would create compensation and restoration funds exceeding $300 million for the Cheyenne River and Yankton Sioux Tribes is now under consideration.[63]

6. DISCUSSION AND RECOMMENDATIONS

The right to health, a decent existence, work and occupational safety and health; the right to an adequate standard of living, freedom from hunger, an adequate and wholesome diet and decent housing; the right to education, culture, equality and non-discrimination, dignity and harmonious development of the personality; the right to security of person and of the family; the right to development.... all are rights established by existing United Nations covenants. These rights represent the ideal that governments strive for in providing for their citizens' basic life requirements that all humans are entitled to. Millions of displaced peoples can attest to the illusive nature of this ideal.

Individual and group efforts to secure human rights often conflict with broader State and international efforts to manage and use natural resources: powerless groups (race, ethnicity, class, gender) and their rights to land, resources, health, and environmental protection are socially and legally sanctioned casualties of broader state and multinational agendas to develop and manage national resources. The river basins that sustained place-based cultures for tens, hundreds, and thousands of years represent to national and multinational interests investment opportunities that promise profits and exponential economic growth. Damming rivers produces hydroelectric energy to fuel mining, industrialism, and urban expansion. Reservoirs produced by dams are key components in water management systems that support urban, agricultural, and industrial uses.

Resident peoples are often coopted by these economic agendas, and displacement is legitimized by framing development as serving the rights of the nation.

This review of the legal basis for reparations and summary descriptions of reparations cases emphasizes the existing formal mechanisms where rights-abuse complaints can be filed and conflicts resolved. However, exercising the right to seek remedy requires access to political and legal systems that operate in a rights protective arena. And, exercising the right to seek remedy requires the means and ability to participate in prescribed ways.

In reviewing the record of success in bringing cases of local human environmental rights abuse to national and international legal arenas it is clear that the courtroom is not always, and in fact is rarely, an effective arena for actually resolving human environmental rights conflicts. The success of a precedent breaking case-- where the court finds on behalf of the plaintiff and appeals to the decision similarly find on behalf of the plaintiff-- is often followed by a tightening of the legal system in ways that prevent future airing of similar cases.[64] In many cases, it is the psychosocial threat of impending lawsuit (the power generated by fears of what may occur) that is the most politically significant aspect of power in using formal political structures to seek accountability in human environmental rights abuse. And, while the psychosocial threat of international scrutiny and political economic sanctions allows the commissions and forums created by global and regional human rights treaties and covenants to exert some influence on sovereign nations, it is the involvement of the informal political sector-- through monitoring, organizing, protesting, and reporting-- that brings abuses to light, generates interest and attention, and forces (to whatever degree is possible) compliance to national and international human rights norms.

Thus, achieving meaningful redress for dam-affected peoples requires a complex array of actions and initiatives at all levels of the political arena. Given the multiple actors involved and the diverse sociopolitical contexts in which dam projects have been built, the needs associated with achieving the right to remedy are numerous and complicated. The sections below outline a number of points of relevance to the discussion of reparations for dam-affected communities, followed by one or more conclusions stated as “reparations principles” (indented, bold-face text). Suggestions for implementing these principles are also included in the final section entitled “Reparations Possibiliities” with the hopes that these ideas will be explored by a subsequent independent reparations panel or commission.

6.1. Rights to Remedy

The sources of law pertaining to rights to compensation and rights to remedy for abuses accompanying development projects and processes are embedded in multinational declarations, treaties, and resolutions and reflected in the interpretation and implementation of these principles in international and national legislative and judicial actions. Rights pertaining to reparations established via United Nations Treaties include the human right to life, the right to liberty, and the right to security of person, and the right to an effective remedy by the competent national tribunals for acts violating these fundamental rights granted him by the constitution or by law.

While the ideal of human rights is to insure that all humans-- irrespective of nationality, religion, sex, social status, occupation, wealth, property, or any other differentiating ethnic, cultural, or

social characteristic-- are guaranteed the conditions necessary for a life of dignity in the contemporary world, at the experiential level, conflicting interests, greed, ethnocentric prejudices, and simple brutality intercede between law and practice. Human action and a history of social inequity leaves some people more vulnerable than others, and this vulnerability often results in conflicts that lead to ethnocide (loss of a way of life), ecocide (destruction of the environment), and genocide (death of an entire group of people).[65]

Efforts to air complaints, assign responsibility, and prevent future abuses have produced an imperfect, haphazard set of remedial mechanisms. Remedial actions emerge from agreements established by bilateral or multinational treaty, national or international court case judgments, or as a result of state or organizational reaction to pressures generated by public campaigns. Many States will make reparations on their own, without outside intervention, especially when facing the political consequences of their breach of international obligations. For other breaches, injured parties find it necessary to make a claim for reparations before a national or international tribunal. Which tribunal will hear a case is dependent on the law or treaty setting up the tribunal, any discretion that the tribunals may have in turning away cases, and whether the parties have agreed to adjudication before the tribunal. To make a claim, an injured party must have standing (whether the party making the claim was owed an obligation and whether they in fact suffered injury). In addition to standing, most international agreements and court procedure seem to require negotiation as a prerequisite to filing claims in an international tribunal. Customary international law also requires claimants to exhaust local remedies before bringing some types of claims.

Elements of a meritorious redress claim established by existing mechanisms reviewed in this paper include:

- a human injustice must have been committed;
- it must be well-documented;
- the complaint is filed by the victim(s);
- the group must be identifiable as a distinct group or category of affected people;
- members of the group must continue to suffer harm;
- such harm must be causally connected to a past injustice;
- all available institutional mechanisms to resolve the complaint must have been exhausted.

Reparations -- the right to remedy-- is mandated by international law.

Injustice and efforts to seek redress involve a range of political processes including: Negotiations and treaties accompanying peace agreements; Negotiations and treaties accompanying release of trust territory or colonial obligations; Court cases, political negotiations, treaties and/or settlements following environmental disasters; Court cases, political negotiations, treaties and/or settlements following public relations disasters.

Exercising the right to seek remedy requires access to political and legal systems that operate in a rights protective arena.

Exercising the right to seek remedy requires the means and ability to participate in

prescribed ways.

6.2. Culpability

Remedial mechanisms reviewed in this paper are largely geared towards resolving complaints between or involving States. Increasingly, development financing institutions are creating complaint mechanisms, though these are typically internalized processes limited to current investments and direct actions. Complaints involving the failures of past projects or the actions of project partners or sub-contracted entities, are not generally deemed relevant. While informal mechanisms (media campaigns and public advocacy) bring attention to those cases that fall through the culpability gap, relatively few formal mechanisms exist to bring complaints against non-State actors involved in the development process. However, this review has noted the emerging trend in international and national courts to hear complaints involving multiple actors and an expanding record of reparations cases where culpability for rights abuse is assigned to non-State actors including public and private financial institutions, and private corporations.

The International Covenant on Civil and Political Rights delineates state responsibilities to ensure that any person whose rights or freedoms are violated shall have an effective remedy developed by competent judicial, administrative or legislative authorities and that the competent authorities shall enforce such remedies when granted. This convention also recognizes responsibilities of States to honor foreign investment agreements, and delineates responsibilities of States and international organizations to "strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the United Nations Charter and the principles set forth in the present resolution..." (A/RES/18038). However, while international law recognizes the state's right to nationalization, expropriation or requisitioning for reasons of public utility, security, or national interest which are recognized as overriding individual or private interests, this right is limited when such action violates fundamental human rights, including freedom from persecution and crimes against humanity. Individual States may no longer rely on their sovereignty when the majority of States consider genocide, ethnocide, and ecocide common concerns of humankind that require effective politics on a global scale. States may now be forced to obey environmental and human rights norms via trade restrictions and other issue-specific limitations without their consent.

While it is the State's responsibility to protect the rights of its citizens, including the right to just compensation, international organizations party to foreign investment agreements are also recognized as having obligations and responsibilities to the rights and duties specified in the United Nations Charter, Declarations, and Instruments. Further, States and other public authorities, international organizations, individuals, groups and corporations have responsibilities to ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in areas beyond the limits of national jurisdiction. And, States and other public authorities, international organizations, individuals, groups and corporations have responsibilities to ensure that their activities do not violate the common concerns of humankind as articulated in international human rights agreements. When damage does occur, public authorities, international organizations, individuals, groups and corporations all may be liable for resulting environmental impacts or damages that violate international

agreements. Efforts to make amends may be the result of tribunal judgments, or volunteer actions to repair public image.

The record of reparations for crimes against humanity associated with World War II events indicates that those who established policies that produced human rights abuse, as well as those who benefited economically from the abuse of human rights, are culpable and can be required to make amends, despite the passage of time. With reference to dam development and other large-scale development processes, because rights may be abused at every stage of the development process moral and legal culpability often involves multiple parties. Culpability for the human rights abuses accompanying dam development and water resource management processes include those responsible for the initial decisions and plans to build a dam, the placement and construction of the dam, the compensation and removal of affected peoples, and the long term management of water resources. States, international organizations, financial institutions, private industries and businesses, and individuals, can all be held culpable and obligated to make amends.

Common Concerns of Humankind Supersede Sovereign rights.

International Organizations have obligations and responsibilities to protect human rights.

Responsibility for Reparations may involve multiple actors including States, financing institutions, organizations, and private corporations.

6.3. Reparation

Reparation is defined as being action or processes that repair, make amends, or compensate for damages. There are three generally recognized forms of reparation: restitution, indemnity (or compensation), and satisfaction.

Restitution is designed to put the offended state back in the position it would have been had the breach not occurred, and may include performance of the obligation, revocation of the offending act, or abstention of the unlawful conduct. Fulfillment of the original terms of a resettlement agreement might represent "performance of the obligation" as argued by the World Bank in the Chixoy Dam case. Restitution might also include measures to restore productive fisheries, as illustrated in the Grand Coulee Dam case. And, restitution might providing funding to cover the costs associated with long term environmental monitoring, remediation, and ecological rehabilitation of damaged resources, as illustrated in the case of Enewetak, who received a $91,710,000 award to restore lands harmed by the Nuclear Weapons Testing Program during the United States trusteeship period.

Indemnity, also termed compensation, involves the payment of money to the offended party for any losses incurred by the illegal act, including any lost profit or value of lost property. For example, the RMI Nuclear Claims Tribunal property damage award to the people of Enewetak, a subsistence oriented people who lived largely outside of a market economy, includes an award

for loss of land. The award of $199,154,811 was meant to reflect the economic value of lost income from past and future loss of land with values derived from the record of lease agreements for similar lands in other parts of the nation.

Satisfaction includes almost every other form of reparation and is meant to address any non-material damage. Examples of satisfaction include public acknowledgements that a wrong was committed and formal apologies to those who experienced harm as illustrated in the Truth and Reconciliation Commission hearings in South Africa, or apologies from the United States government to Japanese-Americans imprisoned in internment camps during World War II. Satisfaction also includes the criminal prosecution of culpable parties, as illustrated by recent efforts in China to prosecute officials for the appropriation of funds earmarked for resettlement and other social programs accompanying Three Gorges Dam development.

For many traditional cultures where power, authority, status, and meaning is shaped by kinship and the meaningful use of communally-owned resources, loss of land represents loss of the means to sustain social institutions, to reinforce kinships systems, and to survive and thrive as a self-sufficient entity. Thus, satisfaction, as a form of reparation, also includes damage awards for hardships encountered as a result of the original breach of obligation.

For example, in the 1980s the Southern California Soboba band of Mission Indians were awarded compensation for the impoverishment and sociocultural disintegration that occurred after building the Colorado River aquaduct in the 1920s, when tribal water resources began to dry up and eventually disappear. The court found that the tribe as a whole had experienced damage from the loss of "natural capital" represented by naturally-occuring water resources on their reservation. Court rulings acknowledged that compensation to individuals for the loss of water and agricultural production did not adequately compensate for broader sociocultural losses, and damage awards included funds to support social reconstruction of the Soboba community.

And, recognizing the links between land and a customary way of life, the RMI Nuclear Claims Tribunal ruled that 145 Enewetak people and their descendants should be compensated for hardship experienced over a fifty year period for suffering associated with involuntary relocation and changes in culture resulting from their loss of use of customary lands.

Reparations awards for loss of land might also involve a mix of cash compensation and remedial actions that not only reflect damages but represent a committment to restore what has been damaged by developing the capacity to regain meaningful and self-sufficient ways of life. This point is illustrated in the Zuni Land Claims Case, where U.S. Congress established a $25 million trust fund to managed cooperatively by the Zuni and the U.S. Department of Interior to provide the Zuni with the ability and means to restore and manage Zuni natural resources. Remedial actions funded under this award include developing a methodology for sustained development of renewable resources; a program of watershed rehabilitation; a computerized system of resource management and monitoring; programs for funding and training of Zuni Indians to fill professional positions that implement the overall plan; developing proposals for cooperative programs with the Bureau of Indian Affairs and other private or public agencies to provide technical assistance in carrying out the plan; and identification and acquisition of lands necessary to sustain Zuni resources development. Portions of the trust are also set aside to pay outstanding debts of the Tribe, to construct a public elementary school and increase educational

opportunities, and to purchase land for the community.

Reparations acknowledge and attempt to repair, make amends, and compensate for past failure.

Reparations recognize the original breach of obligation, the consequences of these failures, and attempt to repair the long-term and cumulative affects of past failures.

Meaningful reparations for damage to a way of life not only replace the means of community production (land and other natural capital) but enhance the mode of production (education, environmental restoration, and economic development programs).

Meaningful reparations for damage to a way of life are defined and shaped through the active participation of affected peoples.

Agreements providing compensatory awards and other reparations generally involve an exchange of grievance rights for damage awards. Claimants may regain their right to file grievance in situations where conditions change or new information comes to light demonstrating the failure of remedial actions to meet obligations stipulated in the agreement.

6.4. Reparations Principles and their Implications for Dam-affected Communities

Testimonies, declarations and thematic reviews prepared for the World Commission on Dams suggest that in order to facilitate effective participation of communities in remedial action processes, and to increase openness and transparency, the following must be done:

- Empower communities, including informing them of their rights.
- Increase the involvement of local and international NGOs and the media.
- Facilitate the development of community committees.
- Strengthen other existing locally based structures.
- Provide capacity building and training programs, including those related to home construction.
- Make available to the public all project documents, including budgets; and
- Provide funds for community and NGO participation.

The goal of a reparations program for dam-affected communities should not be to simply restore the community to their pre-dam level of prosperity, but provide the means and ability to enjoy a self-sufficient, sustainable way of life, suggesting the following reparations principles:

Damage from dams must be assessed in terms of human relationships and experiences and

the environmental means to sustain human communities.

Reparations programs must define affected peoples according to actual experience of impacts, rather than limiting eligibility for reparations to the population identified in original project documents.

Damage from dams must be assessed on a watershed-wide basis, because the effects of damming a river extend over the watershed both upstream and downstream.

Damage assessments and remedial actions should reflect those losses that are not easily translated into monetary compensation: the flooding of burial grounds, the sundering of kinship groups, and the loss of traditional ways of life.

Remedial actions might include education and job training programs that enhance the communities capacity to develop and mange its own resources.

Reparations should be based on community identification and prioritization of needs, and community participation in developing compensatory and remediative strategies.

6.5 Fiscal Responsibility

Responsibility for providing reparations to dam-affected communities should include the multiple actors who authorized and profited in the original planning, financing, construction, implementation of mitigation measures, and the subsequent management of water and energy projects.

Possible reparations financing mechanisms include:

- moratorium on development financing until funds reparations agreements are implemented,
- percentage imposed on current loans to dam development projects,
- percentage imposed on current income from energy and water management projects,
- percentage of donations from member countries,
- percentage of donations from organizations and industries who profited in planning and facilitating resettlement projects
- percentage of donations from organizations and industries who profited in planning and building the physical infrastructure.

Given the long-term and cumulative affects of involuntary relocation, environmental degradation, and related problems experienced by dam-affected communities, reparations must address these broader damages.

Culpability for damages resulting from violations of rights and breach of obligations extends beyond the temporal time frame of a project plan, financing or construction contract.

The appropriate form of monetary and non-monetary reparations must be decided case by case through transparent, participatory processes.

Reparations schemes must be administered on a watershed-wide basis, which requires cooperation between different riparian regions or nations.

In order to ensure that reparations agreements are implemented properly and promises are not broken, Government, project authorities and other project developers must take enter into binding and enforceable contracts for compensation and remediation. These contracts must be properly negotiated and agreed upon with affected communities.

6.6. Reparations Possibilities

A number of dam-affected communities have called for the creation of an international law to be created to enforce just compensation, resettlement and benefit-sharing in the development process, and for the creation of a transparent, independent body to address future ongoing and future dam issues. This review has found that significant culpability gaps exist, and echoes these calls for developing mechanisms that allow dam-affected communities to seek meaningful redress in a rights-protective forum.

An essential first step would be the creation of an independent panel or commission charged with determining the shape and feasibility of an international reparations mechanism -- a commission, tribunal, or other entity created through international agreement, treaty, or other process.

The international reparations panel might include legal scholars and other experts, representatives from affected communities or advocacy organizations, representatives from the United Nations or other agencies that might serve as an institutional homes for a reparations body, and representatives from organizations representing financial institutions, development and management industries. The reparations panel could be tasked with detailing the specific functions that an independent reparations tribunal might serve, and outlining the principles that might govern the operation of a reparations claims process. Questions that an independent, international reparations panel might explore include:

- how to support the ongoing and emerging efforts to achieve redress at national, regional and local levels;

- whether an international, regional, and/or watershed tribunal can fill the culpability gaps that currently exist;

- how these tribunals might go about the process of assessing damages and determining the kinds of reparations appropriate for those claims that are, for one reason or another, unable to be addressed by existing local, national, or regional or institutional mechanisms;

- how to work with other international and national bodies and organizations to coordinate

redress efforts and determine an appropriate institutional home for international, regional or watershed reparations tribunals;

- how to provide reparations tribunals with the means and authority to review cases involving multiple parties (States, funding institutions, corporate entities);

- how to create mechanisms that ensure reparations decisions are actually implemented.

Possibilities for implementing a reparations mechanism might, for example, include a two-tiered reparations tribunal system, with communities presenting cases and claims to a Watershed Council where remedial decisions could be crafted. And, with reparations recommendations involving external parties presented to an international tribunal with the authority to hear cases and assign culpability. Both the regional Watershed Councils and the International Tribunal would act as independent, transparent entities.

Monetary reparations could be established according to a fixed formula through the decisions and actions of the international tribunal, but the expenditure of reparations awards would require local, watershed-based knowledge, expertise and sensitivity. Reparation awards might be administered through a system of watershed-based claims tribunals empowered to hear claims, determine damages, award funds to support remediative actions, and resolve conflicts resulting from the implementation of reparations. Watershed Claims Tribunal might include members of community groups, or representatives chosen by community groups; legal, environmental, and social experts from country or countries involved; representatives from the International Claims Tribunal; representatives of development agency or agencies; representatives of lending organizations who financed the project. An International Tribunals could be staffed by claimant advocates and provided with sufficient funding to support efforts to effectively communicate claimant rights to remedy, and provide technical assistance in filing and presenting claims.

Other possibilities include creation of a reparations trust fund, with contributions from those parties and organizations that profited from projects where abuses have been documented, and managed by an independent , transparent International Tribunal. Regional advocates might be appointed to help develop reparations cases and remedial requests. Contributing parties might serve in defensive roles to ensure cost-efficient use of their funds. Legal expertise on tribunals would be required to ensure that decisions conform to the laws of the countries and to International Laws. Legal members might be selected by local governments and by non-governmental organizations working with affected communities.

The above reparations principles and possible implementing mechanisms are presented as ideas meant to encourage and frame further efforts to achieve redress. Given the multiple actors involved and the diverse sociopolitical contexts in which dam projects have been built, the needs associated with achieving the right to remedy are numerous and complicated, and deserve far greater attention than has been paid in this paper. Thus, this paper is offered as a beginning point rather than concluding statement on reparations.

7.0 End Notes

[1] World Commission on Dams thematic reports examine a wide range of technical, environmental, and social

problems, identify preventative measures, and recommend remedial actions including monetary as well as non-monetary measures (e.g.,dam decommissioning), official recognition of injustices committed, and restoration of ecosystems. Reprots reviewed in support of this paper include: The Social Impact of Large Dams; Displacement, Resettlement, Rehabilitation and Development; Participation, Negotiation and Conflict Management in Large Dams Projects; Dams, Ecosystem Functions and Environmental Restoration; Trends in the Financing of Water and Energy Resources Projects; and, Environmental and Social Impact Assessment for Large Scale Dams.

[2] "Reparations For Dam-Affected Populations" by Alex Marthews, Gila Neta, Michael Sullivan and Yolanda Uzzell, (Richard and Rhoda Goldman School of Public Policy, University of California at Berkeley) May 2000: Appendix "A". Paper submitted in support of this study on Reparations for Dam-Affected Communities. Sources cited include: "A People Dammed: A Witness for Peace Publication" by Julie Stewart, Kevin O'Connell, Marian Ciborski, and Matthew Pacenza (1996); World Bank Background Note, Chixoy Hydroelectric Project, Guatemala (September 27, 1996); Interview with Carlos Chen (April 8, 2000); Study by Jaroslava Colajacomo, from Reform the World Bank Campaign, Italy, submission to the World Commission on Dams (2000); "The Chixoy Dam Case" by Carlos Chen, Rio Negro Community, Guatemala; World Bank, Project Performance Audit Report: Guatemala: Chixoy Power Project; (June 30, 1992: pp.X).

[3] It is important to note the difficulty of separating the overall "counter-insurgency" efforts of the Guatemalan Army from particular conflicts like that of Rio Negro community and their resistance to the dam development. The United Nations sponsored Commission for Historical Clarification (Truth Commission), in their February 1999 report ("Memoria del Silencio") observed that some 200,000 Guatemalans were killed in Guatemala between 1960 and 1996. Of the victims, 94% were killed by Guatemalan state forces, 3% by undetermined parties, and 3% by the URNG revolutionary movement. The report also notes that between March 1980 and September 1982, 440 people from Rio Negro were killed (55.5% of the population), and in those dates, some 4000 to 5000 Maya Achi were killed in the area of Rabinal (between 18% and 23% of the population). The report concluded that in certain Mayan-dominated regions of the country, including Rabinal (where the Rio Negro community lived and the Chixoy dam was built), Guatemalan military forces planned and carried out genocide. According to the report, evidence of the Guatemalan Army intent to destroy the Rio Negro community through a genocidal campaign includes four massacres, arbitrary executions of other community members before and after massacres, and harsh living conditions due to flight from massacres and forced resettlement from dam construction. Rio Negro was the only community in the dam basin which objected to relocation and the only community that suffered massacres.

[4] As reported in "Resettlement Gone Wrong: The Case for Reparations" World Rivers Review (December 1999:8).

[5] "Reparations For Dam-Affected Populations" by Alex Marthews, Gila Neta, Michael Sullivan and Yolanda Uzzell, (Richard and Rhoda Goldman School of Public Policy, University of California at Berkeley) May 2000: Appendix "C". Paper submitted in support of this study on Reparations for Dam-Affected Communities. This summary is derived from the World Commission on Dams Report on Kariba Dam.

[6] Ted Scudder, personal communication 4 July 2000.

[7] "Reparations For Dam-Affected Populations" by Alex Marthews, Gila Neta, Michael Sullivan and Yolanda Uzzell, (Richard and Rhoda Goldman School of Public Policy, University of California at Berkeley) May 2000: Appendix D. Paper submitted in support of this study on Reparations for Dam-Affected Communities. Sources cited include: World Commission on Dams, Tarbela Report; "Experts working on feasibility for small dams'" in Network News International, 4/3/2000. "Tarbela Dam: On Providing Compensation'" in Independent Review of Outstanding Resettlement Issues (19960; and, Ahmad, I. , Naqvi, T. , Khan, K. , "Tarbela Dam Project: Independent Review of Outstanding Resettlement Issues" May 1996.

[8] The Manibeli Declaration, signed by 326 organizations from 44 countries, calls for a moratorium on World Bank lending for large dams and reparations in the form of a World Bank-funded independent, transparent, and accountable institution to assist dam-affected peoples in filing reparations claims and to provide compensatory awards. The 1997 Curitiba Declaration broadened the scope of the Manibeli Declaration, calling for governments, international agencies, and investors to implement a moratorium on large dam building. This declarations was approved at the First International Meeting of Peoples Affected by Dams in Curitiba, Brazil, and argues that conditions to lift the moratorium should include reparations (land, housing, and social infrastructure) negotiated with the millions of people whose livelihoods have already suffered. Reparations are also defined in this document as including actions to restore environments damages by dams, including the removal of dams. Cited in "After the Flood: Reparations for Dam Victims Needed to Right Past Wrongs" by Patrick McCully, World Rivers Review, December 1999:6.

[9] Final Declaration: Voices of Affected Communities. The Southern African Hearings for Communities Affected by Large Dams (November 1999) were hosted by Environmental Monitoring Group, International Rivers Network and Group for Environmental Monitoring. For further details contact: Liane Greeff, Environmental Monitoring Group, Box 18977, Wynberg, South Africa; Email: liane@kingsley.co.za.

[10] In addition to sources referenced in text, this section on international law and the following section on reparations for war crimes incorporates material from a Center for International Environmental Law memo entitled "Possibility of pursuing reparations for victims of World Bank involuntary resettlement projects" by Melissa A. Hearne, March 14, 2000 and submitted in support of this reparations paper.

[11] American Heritage Dictionary, version 3.0.1 1993.

[12] However, while the breach of obligation established in project funding agreements has been demonstrated on numerous occasions, including dam development cases described herein, achieving redress has clearly been inhibited by the lack of mechanisms that assign responsibility for addressing the breach, and confirm to whom the obligation is owed.

[13] Examples of public apology as reparation include statements and written apologies by the United States government to Japanese families imprisoned in U.S. internment camps during World War II; or, apologies from President Clinton to the indigenous people of Hawaii for unlawful seizure of a the lands and resources of a sovereign nation by past administrations of the United States government.

[14] For example, on February 25, 2000, the former director of the district construction bureau in Fengdu received the death sentence for stealing 12 million yuan (1.44 million dollars) from the Three Gorges Project accounts. Also noted was the conviction of Wang Sumei, an official from the migration bureau in Wanzhou district who was jailed for life in May 1999 for embezzling money from the bureau and losing it in mahjong gambling parties between September 1997 and December 1998. Investigations of some 14 officials involved in dam corruption indicate that embezzled money was used to construct buildings, set up companies and buy shares on the stock market. China's auditor general reported in January 2000 that around 600 million dollars earmarked for the resettlement of those made homeless by the project had been embezzled, 12 percent of the entire relocation budget. A subsequent press conference revised the embezzled figure down to 7.4 percent of the relocation budget. "Chinese Official Sentenced To Death For Three Gorges Corruption" <http://www.insidechina.com/news.php3?id=141680>

See also, the ongoing efforts to prosecute corruption in the Lesotho Highlands Water Project. In November 1999, ten companies and two consortia were summoned to appear in a Lesotho court on charges of bribing Masupha Sole, the former director of the Lesotho Highlands Development Authority. Sole is accused of accepting around $2 million in bribes from major dam-building firms such as ABB (Swedish/Swiss), Acres International (Canadian), Impregilo (Italian), Lahmeyer (German) and Sogreah (French). These companies worked on the Katse Dam, part of the Lesotho Highlands Water Project. Katse is now completed and work has started on a second dam, Mohale. Widespread corruption on the project is thought to be one reason that the social fund intended to help affected communities has accomplished virtually nothing. The World Bank provided fiscal management and loans for the Lesotho project. Reported in, "When the Rivers Run Dry - The World Bank, Dams and the Quest for Reparations." International Rivers Network briefing paper, April 2000.

[15] Except where noted, information in this section, including text from declarations, resolutions and treaties, is drawn from *The United Nations and Human Rights 1945-1995* introduction by Boutros Boutros-Ghali, United Nations Blue Book Series, Department of Public Information, United Nations, New York, 1995.

[16] In commenting on a draft of this paper, Neil Popovic points out that the legal status of principles identified in this section are varied. For example, many of the principles present in the Universal Declaration of Human Rights are still considered aspirational, whereas the European Convention on Human Rights is enforceable.

[17] See Texaco Overseas Petroleum Co.v.Libyan Arab Republic, 17 I.L.M.1,30 (1978); Filartiga v.Pena Irala, 630 F.2d 876 (2d Cir.1980).

[18] This summary of the rights of indigenous peoples, especially those established via ILO Convention Articles, is drawn in large part from Paul J. Magnarella, "The Human Rights of Indigenous Peoples in International Law: A Brief and Partial Overview" published in the American Anthropological Association Anthropology Newsletter, April 2000.

[19] List of judgments and opinions of the International Court of Justice on the subject of human rights, *The United Nations and Human Rights, 1945-1995*, p 510; and, International Court of Justice Findings from 1996 and 1997, summarized in Popovic and Jolish 1999:6

[20] [21 March 2000] ICJ/597: World Court Extends Time for Writte Pleadings in Case Concerning Application of Genocide Convention.

[21] The Court noted "In developing and implementing such policies as would produce effects on the culture of indigenous minority groups, the government has a special duty to give adequate consideration to such cultures with a view to avoiding unjust encroachment on their rights." The Court found that: "The government failed to carry out the necessary research and assessment process and that it unfairly devalued and disregarded the Ainu's cultural heritage and values. Moreover, it did not take steps to minimize the damage to Ainu culture. Therefore, the government exercised an ultra vires discretionary power under the Land Expropriation Act making the project approval as well as the expropriation illegal." While the Court found the expropriation to be illegal, it also deemed it inappropriate to declare the expropriation decision null and void as dam construction had been completed, the land in question is now submerged, and decommissioning of the dam would not be in the "public good." See Toshiaki Sonohara "Toward a Genuine Redress for an Unjust Past: The Nibutani Dam Case" in Murdoch University Electronic Journal of Law, Vol 4, No 2 (June 1997).

[22] Biermann, Frank. "Justice in the Greenhouse: Perspectives from International Law" in Ferenc Toth ed., *Fairness and Climate Change* (London: Earthscan) 1998. See also Biermann, F., 1996, "Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law, *Archiv des Volkerrechts* **34**(4):426-481.

[23] Popovic (1996:563) cites the United Nations Convention on the Law of the Sea, articles 207-12 requiring adoption of national laws to prevent, reduce, and control marine pollution; the Convention from the Protection and Development of the Marine Environment of the Wider Caribbean Region, article 14, March 24, 1983 (U K.T.S. 38) 1988, 22 I L.M. 221 calling for adoption of rules and procedures on liability and compensation; Convention for the Protection of the natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, article 20, 26 I..L.M. 38 calling for adoption of rules and procedures on liability and compensation; Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, article 2, UNEP Doc.IG.53/5, 26 I.L.M.1569; and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, December 18, 1971, October 16, 1978, 1971 U.N J.Y.B.103 addressing the need to provide compensation for pollution damage under the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969.

[24] Cited in Popovic and Jolish 1999:5. "Human Rights and the Environment: Material for the Fifty-Fifth Session of the United Nations Commission on Human Rights, Geneva, 22 March-30 April 1999, report prepared by Neil A. F. Popovic and Taly L Jolish, Earthjustice Legal Defense Fund, 1999.

[25] Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J.174 (Advisory Opinion 1949).

[26] United Nations General Assembly. Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations. 37 I.L.M. 700 (1998).

[27] Sources for this section include International Labor Office Fact Sheet, International Labor Standards, Washington Branch, January 1991; and, abstracted statements from "Indigenous and Tribal Peoples- A Guide to ILO Convention No.169" published on the ILO website (http://www.ilo.org).

[28] Discussion of the China Western Poverty Reduction Project in United Nations, Economic and Social Council, Distr. GENERALE/CN. 4/2000/NGO/5 13 February 2000. Relevant "population transfer" documents include "The Human Rights Dimension of Population Transfer, Including the Implantation of Settlers: Preliminary Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities" (1993) by A.S. Al-Khasawneh and R.Hatano, E/CN.4.2/1993/17; "Fact Sheet No.25: Forced Evictions and Human Rights" (U.N. High Commission for Human Rights); Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights Resolution 1007/39: Addendum: Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection Against Arbitrary Displacement" E/CN. 4/1998/53/Add.1, Feb.11, 1998; and, "Report of the Expert Seminar on the Practice of Forced Evictions, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1997): The Practice of Forced Evictions: Comprehensive Human Rights Guidelines on Development-Displacement [Guidelines].

[29] This summary is drawn from Chilean newspaper articles reprinted on the Mapuche Foundation (http://www.bounce.to/cim) and Rehue Foundation (http://www.xs4all.nl/~rehue) websites, and from Barbara Rose Johnston and Terence Turner's paper on "The Pehuenche, the World Bank Group and ENDESA S.A.: Violations of Human Rights in the Pangue and Ralco Dam Projects on the Biobío River, Chile," American Anthropological Association Committee for Human Rights (AAA web page, April 1998), revised version published Fall 1999 in the Journal *Identities* 6(2-3).

[30] Case of Guerra and Others v. Italy, 19 February 1998. Discussed in Popovic and Jolish 1999:10.

[31] Azerbaijan, Belarus, Colombia, Czech Republic, Ecuador, Eritrea (draft), Georgia, Kazakhstan, Moldova, Norway, Russia, Slovakia, Ukraine, Yugoslavia. Note, these numbers may be a factor of when constitutions are drafted, with older nations providing similar rights and responsibilities via congressional acts and court rulings.

[32] Summarized from Box 5, Indigenous and Tribal Peoples- A Guide to ILO Convention No.169, published on the ILO website (http://www ilo.org).

[33] Presidential decrees concerning indigenous territories, section 153 of the Forest Act and article 171 of the 1994 Constitution. Presidential decrees were authorized following the Marcha por el Territorio y la Dignidad (March for Territory and Dignity) carried out by several lowland indigenous peoples from Trinidad to La Paz in 1990.

[34] Summarized from Box 5, Indigenous and Tribal Peoples- A Guide to ILO Convention No.169, published on the ILO website (http://www.ilo.org).

[35] China Report 1999, in de Wet et al, World Commission on Dams 2000:46.

[36] "Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses" released by the US Environmental Protection Agency, Office of Federal Activities, April 1998; Council on Environmental Quality, March 1998, Guidance for Addressing Environmental Justice under the National Environmental Policy Act (NEPA); Council on Environmental Quality, January 1997, Considering cumulative Effects Under the National Environmental Policy Act; Executive Order 12898 on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations with accompanying Memorandum, February 11, 1994; Executive Order 13007 on Indian Sacred Sites, May 24, 1996; The National Environmental Policy Act of 1969 as amended, 42 U.S.C. 4321-4347, January 1, 1970; U.S. General Accounting Office, June 1, 1983, Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities.

[37] Reported in Earth Island Journal, Spring 1992:13.

[38] Popovic (1996:586) cites environmental treaties including the International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art.111(1), 973 U.N.T.S.3,9 I.L.M.45 (1970), making shipowners liable for pollution damage; Convention for the Prevention of Pollution of the Sea by Oil, 1954, art.vi, 327 U.N.T. S.3, 12 U.S.T. 2989, T.I.A.S.No.4900, 600 U.N.T.S.332, 17 U.S.T.1523, T.I.A.S No.6109, 28 U.S.T.1205, T.I.A.S.No.8505) stipulating penalties for violations to be imposed against offending ship; Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, art.3, 956 U.N.T.S.251, imposing liability on operators of nuclear installations; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, artc. II, IV, 1063 U.N.T.S.265, 7 I.L.M.727 (1968), imposing liability on operators of nuclear installations. Human Rights treaties making international organizations responsible for certain human rights violations include the International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV, U.N.GA Res. 28/3068, Nov. 30, 1973, holding private parties liable for acts of genocide.

[39] Source: World Bank Inspection Panel, Conclusions of the Board's Second Procedural Review, 1999 (http://www.worldbank.org/html/extdr/ipwg/secondreview.htm).

[40] Abstracted from the Office of the Compliance Advisor/Ombudsman for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) webpage <www.ifc.org/cao/ImpactCAO.pdf>. See also Compliance Advisor/Ombudsman (CAO) article "Building Accountability From the Ground Up" IFC Impact Magazine of Fall 1999, Volume 3, No. 4.

[41] "Accord near for fund to pay W.W. II slave laborers" San Jose Mercury News, 26 May 2000:5C.

[42] Ramasastry, Anita. "Secrets and Lies? Swiss Banks and International Human Rights" 31 Vand.J. Transnational L. 325, 352 (1998). See also, U.S. Department of State. U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany during World War II, Preliminary Study. 140 (1997)

[43] See Japanese American Evaluation Claims Act (50 USC, sec. 181); and the 1988 Civil Liberties Act (Public Law 100-383). See also "Reparation bill would compensate 2000 more: Japanese Latin Americans got no '88, '98 restitution" Robert Jablon, San Jose Mercury News, 16 May 2000:3B.

[44] "Seeking Redress for long legacy of Prosecution" Russell Working, San Jose Mercury News, 14 May 2000: 1AA, 6AA.

[45] Truth and Reconciliation Commission homepage, <htpp//www.truth org.za>.

[46] "Reparations: A Moral and Political Responsibility" Brandon Hamber, presentation to the "Implementing the TRC's Recommendations Workshop", Parktonian Hotel, Braamfontein, Johannesburg, 16 February 2000. Paper published on the website for the Centre for the Study of Violence and Reconciliation, South Africa. See also,

Corporación Nacional de Reparación y Reconciliación (National Corporation for Reparation and Reconciliation) a government agency created in 1992 to provide reparation for survivors of torture in Chile.

[47] Discussed in "After the Flood: Reparations for Dam Victims Needed to Right Past Wrongs" by Patrick McCully, World Rivers Review (December 1999):6.

[48] United Nations Charter, Article 75 and 76.

[49] See Mary Christina Woods, Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performances, 25 Environmental Law Journal 733,742 (1995). Discussed in Hyun S. Lee, Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands, Denver Journal of International Law and Policy: 26 (3) Spring 1998: 424-425.

[50] Black's Law Dictionary 626 (6th Edition 1990).

[51] Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), 1992 International Court of Justice 240 (June 26). During its trusteeship period, Australia mined phosphate, removing approximately one third of the island, and leaving the remainder in a degraded state. The ICJ ruled that it had jurisdiction to hear the case, but Australia and the Republic of Nauru settled their claims before the ICJ could issue a ruling. Australia agreed to pay Nauru $107 million (Australian) to facilitate post-phosphate economic development.

[52] Case summary prepared by Holly M. Barker based on research contained in "Collisions of History and Language: Nuclear Weapons Testing, Human Environmental Rights Abuse, and Cover-up in the Republic of the Marshall Islands" Ph.D.Dissertation, Department of Anthropology, American University, June 2000.

[53] On April 20, 1954, a petition was submitted to the United Nations Trusteeship Council on behalf of the Marshallese citizens of the Trust Territory of the Pacific Islands. In this petition, the Marshallese people cite their concerns about the United States Nuclear Weapons Testing Program, concerns that included damage to health and the long term implications of being removed from their land. ("Petition from the Marshallese People Concerning the Pacific Islands: Complaint regarding explosion of lethal weapons within our home islands." United Nations Trusteeship Council: T/PET.10/28. The United Nations Trusteeship Council response to the Marshallese petition noted "The Administering Authority adds that any Marshallese citizens who are removed as a result of test activities will be reestablished in their original habitat in such a way that no financial loss would be involved." United Nations Trusteeship Council. "Petitions Concerning the Trust Territory of the Pacific Islands." July 14, 1954, p.5. (T/L.510).

[54] "Foreign Assistance: Better Accountability Needed Over U.S. Assistance to Micronesia and the Marshall Islands." Draft Report.U.S.General Accounting Office, May 2000:2.

[55] Including $25 million "compassionate payments" under P.L.95-134 providing, among other awards, $25,000 per person awards for those who developed hypothyroidism, developed thyroid tumors that had to be surgically removed, or developed radiation-related malignancy, such as leukemia. In P.L 96-205 a resettlement trust fund was established for Bikinians ($20 million) and a Four-Atoll health program was established. In P.L. 95-134 (section 104b) $100,000 was appropriated for the use of "each of the island communities of Rongelap, Utrik, and Bikini Atolls" for "such community purposes as the municipal councils of such island communities may direct." In addition, the Department of Defense has spent an estimated $80 million in an effort to "clean up" Enewetak Atoll (bulldozing radioactive debris into the ocean or into a large crater and "capping" it with concrete). Holly Barker, personal communication 19 May 2000; Bill Graham, personal communication 16 June 2000.

[56] P.L.990239, Compact of Free Association Act of 1985.

[57] NCT No. 23-0902, Memorandum of Decision and Order in the matter of the People of Enewetak, et al., Claimants for Compensation before the Nuclear Claims Tribunal, Republic of the Marshall Islands.

[58] Criteria include if the RMI can (1) demonstrate the existence the existence of new and additional information about the effects of the testing program; (2) demonstrate that this not new information was not known during the negotiations of the Compact; and, (3) based on this new information, show that U.S. compensation provided in the Compact is manifestly inadequate. P.L. 990239, Compact of Free Association Act of 1985.

[59] Boyden, Stephen G."The Zuni Claims Cases." Zuni and the Courts: A Struggle for Sovereign Land Rights. E. Richard Hart, ed. Lawrence: University Press of Kansas., 1994:225.

[60] Appendix A.Docket 161-79L, Aboriginal Area, p. 245 - 277. in E. Richard Hart, ed. Zuni and the Courts: A Struggle for Sovereign Land Rights. E. Richard Hart, ed. Lawrence: University Press of Kansas., 1994.

[61] Fernandez, R. 1987. "Evaluating the loss of kinship structures: A case study of North American Indians." Human Organization 46:1-9. See also J. Stephen Lansing, Philip S. Lansing and Juliet S. Erazo, 1998. "The Value

of a River." Journal of Political Ecology, vol 5 (1998):1-23. Lansing *et al* apply Fernandez ideas on natural capital in their assessment of the damages experiences by the Skokomish Indian Reservation in western Washington with the building of the Cushman Dam on the north fork of the Skokomish River in 1930. Their research supports arguments that the biological productivity of a river ecosystem is an essential component of the "corporate estate" of the Skokomish tribe. Losses to the biological productivity of the river ecosystem can be seen as reductions in immediate income derived from the river as natural capital. Since 1930 each individual member of the tribe has experienced loss of access to diverse riverine resources, and the "costs to the tribe are analogous to losses in capital rather than immediate income." Lansing *et al* argue that compensation for this loss should include investments in the social and economic infrastructure of the tribe to help restore the depleted value of tribal institutions, in addition to the restoration of the natural systems that formed the basis of the tribe's cultural traditions and "enabled the steady accumulation of natural capital. " (1998:18).

[62] "Reparations For Dam-Affected Populations" by Alex Marthews, Gila Neta, Michael Sullivan and Yolanda Uzzell, (Richard and Rhoda Goldman School of Public Policy, University of California at Berkeley) May 2000: abstracted from Appendix "B". Paper submitted in support of this study on Reparations for Dam-Affected Communities. Sources cited include: Grand Coulee Dam and Columbia Basin Project World Commission on Dams Case Study.

[63] "Native Americans Win Reparations for 1957" Lincoln Journal Star, 27 March 2000 <www.journalstar.com/archives/032600/neb/sto7>

[64] Armin Rosencranz, "Transnational Legal Remedies" paper presented at the conference on Access to Justice and Environmental Protection: International and Domestic Perspectives at Stanford University, May 2, 1998.