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Holle, Marie-Louise

Document Version
Final published version

Published in:
European Public Law

DOI:
10.54648/euro2022011

Publication date:
2022

License
Unspecified

Citation for published version (APA):
Holle, M.-L. (2022). The ‘Then’ and the ‘Now’ of Forced Relocation of Indigenous Peoples: Repercussions in International Law, Torts and Beyond. *European Public Law*, *28*(2), 203-220. https://doi.org/10.54648/euro2022011

The 'Then' and the 'Now' of Forced Relocation of Indigenous Peoples: Repercussions in International Law, Torts and Beyond

Marie-Louise HOLLE*

Forced relocations of tribal and indigenous peoples may seem a thing of the past, as few still defend colonialism. It is therefore seen as a historical trait that has reached its conclusion. Nevertheless, forced relocations of peoples still happens to this day, and may happen again; in the Arctic, for instance, several superpowers of this world express much interest in a strategic presence in this specific area. Today, a number of European countries have indigenous peoples on their territories. This article discusses this topic, taking its starting point in a case on forced relocation, which lasted for six decades. This article also discusses how forced relocation is regulated and possibly could be better handled today.

Keywords: Indigenous People, Tort law, Human rights, Forced relocation, Expropriation, The Thule Tribe, Greenland, Public Liability, Leniency, Compensation Schemes

1 FORCED REMOVALS IN THE INTERSECTION OF INTERNATIONAL LAW AND TORT LAW

In spite of the emergence of human rights, which have in many ways been standard-setting globally, indigenous peoples continue to face serious human rights abuses.[1] Forced relocations of tribal and indigenous peoples may seem a thing of the past of countries with a colonial history.[2] A current example is the eviction and treatment otherwise of the Sengwer people (a hunter-gatherer tribal people in Kenya), leading the UN to express concern.[3] 'Indigenous and tribal

* Associate professor, PhD, DESS, Copenhagen Business School. The article is a revised version of a conference paper presented at the 'Tort law and historical injustice' conference held at UCall Utrecht Centre for Accountability and Liability Law, University of Utrecht in November 2019. Email: mh.law@cbs.dk.

1 https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/human-rights.html (accessed 9 Sep. 2022).

2 D. V. Afsah, *Island of Shame. The Secret History of the U.S. Military Base on Diego Garcia*, 21 Eur. J. Int'l L. 245–274 at 258 (2010).

3 https://www.the-star.co.ke/counties/rift-valley/2020-06-30-sengwers-wont-leave-embobut-forest-dismiss-eu-funding/ (accessed 9 Sep. 2022).

Holle, Marie-Louise. 'The 'Then' and the 'Now' of Forced Relocation of Indigenous Peoples: Repercussions in International Law, Torts and Beyond'. *European Public Law* 28, no. 2 (2022): 203–220.

peoples' is a common denominator for more than 370 million people, found in more than seventy countries worldwide.[4] A number of European countries have indigenous peoples living on their territory: Denmark, France, Norway, Sweden and Finland.

Forced relocations (or forced removals, the two concepts seem to be used interchangeably and will be used that way in the present article) of indigenous peoples may once more pose a threat. Especially shifting considerations of security and national and regional defence may mean that indigenous peoples may be forced to give up their lands. Superpowers such as China, Russia and the USA express much interest in Greenland, due to its strategic, geographic position. Greenland is a 'sweet spot' between the USA and Europe. A number of geographic places on Earth, both far South, North, east and West are attractive from strategic perspectives, because the locations are attractive for instance from a viewpoint of surveillance from space (installations surveying hazards from space), agricultural interests and access to natural resources. This may mean that indigenous peoples are forcibly removed and lose land rights. Therefore, this topic is still highly relevant in Europe as well as on an international level.

In the present study, forced removal of indigenous peoples is analysed and examined, taking its starting point in the case of the Thule Tribe, which started in the 1950s, but only ended decades later. This case is still relevant, and it will be used as a prism shedding light on the issues at hand. The article will discuss the case as the law was applied per se and how it could/should have been solved today. In international law, the UN and the International Labour Organization (ILO) have vested indigenous peoples with rights. Tort law has also been at the core of some cases, and tort law may offer some useful tools.

A case of forced removal, such as the Thule case, touches upon several areas of law: Tort law, human rights, expropriation and collective rights of tribal and indigenous peoples. Beginning with the Thule case, the court's reasoning is discussed; seemingly national expropriation rules are at the core of both the lower and the higher courts' reasoning (2). One may ask how forced relocations, if necessary, should be handled today (3).

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[4] *Understanding the Indigenous and Tribal Peoples Convention, Handbook for ILO Tripartite Constituents/ International Labour Standards Department* (International Labour Organization 2013).

2 THE 'THEN': THE THULE TRIBE CASE

Timeline
Prehistory: Establishment of the Thule Tribe
1953: Forced removal of the Thule Tribe
1960: Local catchers' councils direct claims for annual compensation for the areas lost to the Ministry of Greenland (the claim was not answered by the Danish authorities)
1985: The Thule tribe sets forward a claim for compensation once more
1987-1994: Parliamentary investigative commission
1996-2003: Court cases (Danish Eastern High Court and Supreme Court)
1999: Formal apology to the Thule Tribe by the Danish Prime Minister

In 1951, the US wished to establish a military base in the Dundas area of Greenland, and the wish was granted. The establishment of the US military base meant that the over 100 members of the Thule tribe were forcibly relocated to other areas in a matter of few days. At the time, Greenland was a Danish colony. Greenland's status has changed over the years. Until 1953, Greenland was a colony of Denmark. Greenland then became an integral part of Denmark. In 1979, home rule was introduced, meaning that Greenland became autonomous to a large extent under the auspices of the home rule authorities.

The forced relocation took place in 1953, but the case was not tried before the courts until the lawsuit in 1996. Until 1953, the Thule tribe had for millennia been seminomadic hunters in that specific area of Greenland. Not until some months after the relocation, substitute housing was a reality, and as an attempt of compensation, groceries and various material were handed out to the Thule tribe. Suing the Danish State before the Eastern High Court, the Thule tribe claimed:

(1) *that they had a right to live in and use the Uummannaq settlement* (the area they occupied)*;*
(2) *that they had a right to move and hunt within the entire Thule district;*
(3) *that the Thule tribe was entitled to compensation for the interference with their rights since 1953 (the claimed amount was DKK 25,000,000 (equivalent to 3.3 million euros) before the high court, and DKK 235,114,290 (equivalent to 31,3 million euros) before the Supreme Court); and*
(4) *that each individual relocated was also entitled to compensation of DKK 250,000 (equivalent to 33.000 euros).*[5]

Until the court rulings, the official Danish position had been that the relocation was voluntary, requested by the Thule tribe itself. This was the conclusion reached

[5] Translation from O. Spiermann, *Hingitaq 53, Qajutaq Petersen, and Others v. Prime Minister's Office (Qaanaaq Municipality and Greenland Home Rule Government Intervening in Support of the Appellants)*, 98(3) Am. J. Int'l L. 572–578 (1998).

by the parliamentary investigative commission (1987–1994) set out for examining the relocation of the Thule Tribe. This position was rejected by the High Court,[6] which instead stated that the relocation was a 'serious interference', and that it corresponded to an unlawful measure toward the Thule tribe.[7] The High Court stated that the relocation may in part be the result of 'noble' intentions, in the sense that it was driven by the Danish authorities wanting to preserve the Thule tribe's culture and continued existence. However, what remains is the triggering factor, being the American request to construct the Thule Air Base. While the Eastern High Court did award compensation to the Thule tribe, the court also stated that the relocation (expropriation) was lawful. Subsequently, the Thule tribe appealed the judgment to the Danish Supreme Court, once again not only claiming their right to the land, but also an increase in the compensation amount claimed.

The first two claims were rejected by both the Eastern High and the Supreme Court, while the third and fourth claim (claims for compensation) were partly granted. The Thule tribe claimed damages for serious interference with their rights, as well as loss of hunting opportunities. The Supreme Court delivered its judgment in 2003, essentially upholding the lower court's decision. Stating it was a law measure of legal and valid expropriation, the Supreme Court did award damages. The claim for damages was as such recognized, but the amount awarded was substantially lower compared to the initial claim. The Thule tribe as a whole was awarded damages amounting to the equivalent of 67,000 EUR. Each individual Thule tribe member was awarded damages equivalent of 2,000 EUR. However, the Thule tribe was denied in their claim for returning to their land.

Some scholars have remarked that the court ruling in the Thule case is not clear, because it is uncertain whether the remedies awarded to the Thule tribe are national or international remedies. Perhaps the Danish courts see the Danish rules on expropriation as sufficient.[8] What remains is that the judgment is probably one of the longest in Danish history – almost 230 pages. *Petersen* states that the length is symbolic, as neither the parties nor the courts were certain where they stood.[9]

In 1999, in addition to signing a new agreement aimed at renewing the relationship between the Danish Government and the Home Rule Government, the Danish Prime Minister formally apologized to the Thule tribe:

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6 *Ibid.*, at 592.
7 *Ibid.*, at 596.
8 *Ibid.*, at 572–578.
9 H. Petersen, *Juridiske fortællinger om 'Thule'*, in *Politik og jura* 291 (Koch ed., Thomson 2004).

> *The forced movement was decided and carried out in such a way, and under such circumstances, that it has to be regarded as a serious encroachment towards the people (…) Today, no one can be made responsible for actions committed by past generations almost 50 years ago. But with the spirit of the Commonwealth, and with respect for Greenland and the inhabitants of Thule, the Government would, on behalf of the Danish State, like to offer an apology – utoqqatserpugut (mamiasuktugut) – to the Inughuit, the inhabitants of Thule, and to the rest of Greenland, for the way in which the decision regarding the forced movement was made and carried out in 1953.*[10]

2.1 Expropriation and the demand for return

Under Danish constitutional law, expropriation of land generates compensation according to the Danish Constitution, section 73. The provision reads:

> *1. The right of property shall be inviolable. No person shall be ordered to surrender his property except where required by the public well. This may be done only as provided by statute and subject to full compensation. 2. Where a Bill relating to the expropriation of property has been passed, one-third of the Members of Parliament may, within three weekdays from the final passing of the Bill, request that it should not be submitted for Royal Assent until new elections to Parliament have been held, and the Bill has been passed again by the Parliament assembling thereafter. 3. Any question concerning the legality of an act of expropriation and the amount of compensation may be raised before the courts of justice. The examination of issues relating to the amount of compensation may be referred by statute to courts of justice established for that purpose.*

The Eastern High Court remarks that no real objections were made on part of the Thule tribe, but that it is important to '*take into consideration that the population group living in an isolated manner*' and that the Thule tribe did not have any alternative.[11]

The Thule tribe members were removed at the end of May 1953, but the new housing was not ready until September, and therefore, they had to live in tents until then. Furthermore, the High Court is critical towards the fact that the Thule tribe was not warned or included in the discussion of the plans for the Thule Air Base. The Court states that the Thule tribe should have been given more time to prepare for the relocation.

The claims for compensation were partly granted with reference to international law. Reference was made to the incorporation of international obligations into Danish law. The incorporation happened pursuant to the 1925 Greenland Administration Act, and the Danish government's assurances to the UN Secretary-General prior to 1954 that civil rights, including peaceful enjoyment of possessions, '*were practically applicable to Greenland*'.[12]

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[10] English translation of the text of the apology, https://nunatsiaq.com/stories/article/denmark_and_greenland_building_mutual_respect/ (accessed 7 Jul. 2022).

[11] *Ibid.*, at 592 (my translation). *See also* H. Zahle, *Frivillighed eller tvang: Thuleboernes flytning* 430, 432 (Ugeskrift for retsvæsen 1995B (1995)).

[12] Spiermann, *supra* n. 5, at 572–578, with fn. 9.

In spite of these assurances, in 2003, a memorandum of understanding was created between the US and Denmark, including the Home Rule of Greenland. Hereby the latter accepted the lands '*as is*' and waived '*any and all claims*' against the United States arising from its use of the area. This seems to be a waiver of liability, and taken by its words, it means that the Thule tribe cannot set forward any claims for compensation towards the US. This is further discussed below.

2.2 The ILO Convention

The ILO Indigenous and Tribal Peoples Convention (1989) (No. 169) protects tribal and indigenous peoples and is therefore of relevance to the problem with forced relocations.[13] The ILO Convention is an international treaty adopted at the International Labour Conference in 1989, and it is as such legally binding for states that have ratified it.

According to Article 1(1) of the ILO Convention, the convention applies to:

(a) *tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws of regulations;*
(b) *peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation, or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural, and political institutions.*

Rights of ownership and possession of an indigenous population stretched '*over the lands which they traditionally occupy*' are protected under Article 14(1).

Furthermore, Article 16 provides:

1. *Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy*
2. *Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.*
3. *Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.*
4. *When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of*

[13] *See* further C. Charters, *Global International Instruments and Institutions*, in *Reparations for Indigenous Peoples: International and Comparative Perspectives* 166 (F. Lenzerini ed., Oxford University Press 2008).

quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. *Persons thus relocated shall be fully compensated for any resulting loss or injury.*

While the convention was not in force at the time of the Thule Tribe relocation, the situation created by the relocation has not ceased to exist. The Convention may give rise to a right for the relocated people to return to their lands (Article 16 (3)-(4)).[14] Before the Supreme Court, the Thule tribe argued that Denmark did not live up to the obligations undertaken under the ILO convention.

Upon being petitioned by the Thule tribe, the ILO formed a committee to examine the relocation. The committee concluded that the Danish government has lived up to its obligations under the convention. More precisely, the Danish government has identified the geographical areas that traditionally were in possession of the Thule tribe (Article 14 (2)), and that the government has carried out a coordinated and systematic effort in order to protect the rights of the people as well as to guarantee the respect for their integrity. Furthermore, under the Convention (Article 14 (3)), the government in question must enact appropriate procedures within the national legal system in order to determine indigenous peoples' claim to land. The Committee stated that such procedures are indeed available in Denmark, and that the Thule tribe made use of these procedures. Taken as a whole, Denmark had, in the Committee's viewpoint, respected the Article 14 (3).

The Danish Supreme Court stated that the Thule tribe is not an indigenous population *of its own*, i.e., distinct from the Inuit, but that they are part of the indigenous people of the Inuits.[15] Based on an overall assessment of the available evidence, the Supreme Court found that the population in the Thule district shares the same conditions as the rest of the Greenlandic people and does not differ from the remaining population in any other relevant respects. The Supreme Court therefore found that the Thule tribe does not '*retain some of or all their own social, economic, cultural and political institutions*' and, therefore, the Thule tribe is not a distinct indigenous people, cf. Article 1(1)(b) of the ILO Convention.

In addition, the Supreme Court stated that the Thule Air Base is lawful. The Supreme Court upheld the ruling of the High Court. The plaintiffs claim for increased compensation was therefore rejected, thereby also denying the Thule tribe the right to return. The right to return is also regulated by the ILO Convention.

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14 Spiermann, *supra* n. 5, at 572–578.

15 *Ibid.*, at 606.

The ILO Convention (Article 1(1)(a)) also includes '*tribal populations in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations*'. With the same reasoning as mentioned above, the Supreme Court found that the Thule tribe does not fall within the scope of this provision either. This interpretation is consistent with the declaration made in connection with the ratification of the ILO Convention by the Danish government. The Greenland Home Rule Government acceded to this declaration. From the declaration, it follows that Denmark has only one indigenous people within the meaning of the Convention, being the indigenous population in Greenland (the Inuits). This conclusion is the same as the one reached by the ILO governing body in 2001, also denying a Greenlandic population group a separate status different to other Greenlanders.[16]

Since 1951, a Danish-American defence agreement on Greenland has regulated on-site American military activities. The High Court found that the possible rights of land under the ILO convention yielded to Denmark's obligations under the 1951 agreement to the USA.

3 THE 'NOW': FORCED RELOCATION NOW

In this paragraph, forced relocation is discussed in the light of mainly international law, which is a cornerstone in the establishment of indigenous rights. Firstly, indigenous land rights are addressed (3.1), secondly the regulation of indigenous rights in international law is treated, also briefly addressing the right to a fair trial (3.2). Once the basis of the indigenous rights is established, focus is shifted to public liability. Public liability becomes important in cases where the removal has taken place, and the indigenous people concerned decides to claim damages from the state responsible for the removal. The issue with the possible lenient standard of care is also addressed (3.3). In the last paragraph, admitting the shortcomings of tort law and international law, other means of redress, both legal and moral, are discussed (3.4).

3.1 Indigenous land rights

'Terra nullius' means 'nobody's land'. It is a legal principle formerly used in international law to justify claims for land solely based on a state's occupation of it: *'To identify an area as terra nullius did not imply that there were no people in the area, but that the territory was not possessed by a community having a social and political*

[16] *Ibid.*, at 572–578.

organization'.[17] While the principle is historic, it is important to be aware of it. The principle serves as an underlying awareness because 'terra nullius' is so closely intertwined with colonialism.

Stein states that land rights are broader than strict ownership. Indigenous peoples will often not necessarily wish to have ownership in the traditional legal sense but instead have occupation and different forms of land usage (e.g., seasonal cultivation, grazing, hunting, or worship) recognized as rights to specific lands. This recognition encompasses the classic legal approach, which has often disregarded long-standing land rights that indigenous people have acquired generations back[18] and only privileging individual rights in a setting of expropriation.

In the present, the collective nature of rights to land and property are starting to become recognized by international bodies. The ILO Convention protects nomadic peoples' land rights in the form of a right to *use* land, not to occupy the land as such. Instead, an indigenous/tribal (semi)nomadic group may enjoy access to a land for their subsistence and traditional activities. *Stein* also sees the emergence of the recognition of collective rights to land.[19] It is also, to a certain extent, recognized that there is a cultural value of land, also referred to as a right to 'cultural integrity'.[20]

Some scholars have pointed out that the ILO Convention is somewhat inconsistent when it comes to determining who are the holders of the rights vested by the Convention. Article 16(3)-(4) speaks of collective rights held by 'peoples concerned'. However, the provision vesting people with a right to compensation refers to individuals suffering actual losses. This may seem surprising and inconsistent. However, in this author's opinion, this is due to the very nature and function of tort law, where certainty of a loss is required, as is the determination of the plaintiff (the person(s) having suffered the loss and being entitled to compensation thereof). That being said, the traditional tort law mindset, which has also found its way to the ILO Convention provision on compensation for loss, is less adequate to solve the issues with forced removal of indigenous peoples.

3.2 Indigenous peoples in international law

An ethic group may be recognized as indigenous under national law or international law. In international law, there is no universal definition of indigenous and tribal peoples, but the ILO Convention sets forward a number of criteria,

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17 S. Dodds, *Justice and Indigenous Land Rights*, 41(2) Inquiry 187–205, 189 with footnote 9 (1998).
18 S. Stein, *Reflections on Indigenous Peoples' Rights Vis-à-vis the Law of Occupation*, 23(1–2) Int'l J. Hum. Rts. 297–312 at 302 (2019).
19 *Ibid*., at 297–312, 303–305 with footnote 59.
20 *Ibid*., at 297–312, 303.

subjective and objective criteria, which are applied in order to determine if a group of people is indigenous or tribal falling within the scope of the Convention. The criteria pertain to self-identification, descent from populations, who inhabited the country at the time of conquest, colonization or establishment of present state boundaries etc. They retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status.[21] The number of indigenous peoples may rise, if a number of ethnic groups who wish to become recognized as indigenous will in fact succeed in their claims. Indigenous peoples' legal status is object of some regulation in international law, also to a certain extent regulating forced removals (3.2[a]). On the background of the Thule Tribe case, it is relevant to briefly discuss the impact of the right to a fair trial (3.2[b]).

3.2[a] *Regulation in International Law*

Under the ILO Convention (Article 17 (4)), indigenous peoples are vested with a right to 'substitute' lands: '*lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees*'.

In the aforementioned Thule tribe case, the European Court of Human Rights was ceased by the Thule tribe. In 2006, the Court of Human Rights ruled that the expropriation and forced relocation did not violate the rights of the Thule tribe. The expropriation and forced relocation took place in 1953, before the European Convention of Human Rights came into force in Denmark. The Court examined Article 8 of the European Convention of Human Rights. The provision provides a right to respect '*private and family life, his home and his correspondence*', subject to certain restrictions that are '*in accordance with law*' and '*necessary in a democratic society*'. This provision was examined in the light of Article 1 of Protocol No. 1, which provides as follows:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

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[21] *Understanding the Indigenous and Tribal Peoples Convention*, *supra* n. 4, at 2.

On the merits of the case, the Court ruled that that the Danish State had reached a fair balance between the public interest and the protection of the fundamental human rights at stake when allowing the US Thule Air Base and relocating the Thule tribe.[22]

The European Convention of Human Rights is an autonomous ground for liability for states, also when national rules do not sanction a breach committed by public authorities. Furthermore, national rules should be interpreted in accordance with the provisions of the Convention.[23] Binding, legal rules on human rights are recognized as a source of law, and they should set or standardize the interpretation of national law.[24]

It is also relevant to mention the UNDRIP (UN Declaration on the Rights of Indigenous People), which was adopted by the General Assembly of the United Nations. Nomadic peoples are included in the ILO convention, but left out of the UNDRIP.[25] Though the Declaration does not have a legally binding status, it may have some legal relevance as it reflects obligations of states under other sources of international law, such as customary law and general principles of law.[26] The UNDRIP does not specifically regulate reparations claims from indigenous peoples.[27]

3.2[b] *'Would You Mind Signing Here?': On the Right to a Fair Trial*

In the Thule Tribe case, a previously mentioned, a memorandum was adopted, by which:

> *The Danish Government (including the Greenland Home Rule Government) hereby waives any and all claims of the Danish Government (including the Greenland Home Rule Government) against the Government of the United States arising out of any acts or omissions related to or in connection with the use of Dundas during the period of its inclusion within the Thule defence area.*

The memorandum is a waiver of liability for the US, as it could be considered to be having an effect as barring the judicial review of the plaintiffs' claims for compensation. It is probably fair to think that the Memorandum could have

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22 *European Court of Human Rights, Hingitaq 53 v. Denmark*, 18584/04, 18–21 (12 Jan. 2006).

23 From Swedish law: H. Andersson, *Från princip till detaljtillämpning inom EKMR-skadeståndsrätten – kausalitet, bevisning, beloppsbestämning etc*, (Särtryck) PointLex (2008).

24 *See also* from Danish law: J. Christoffersen, *Det offentliges kompensationsansvar for krænkelser af internationale menneskerettigheder (II)*, Ugeskrift for retsvæsen U 2016B.232 (2016), and P. Justesen, *Dansk ret og FN's Racediskriminationskonvention*, Ugeskrift for retsvæsen U 2001B.148 (2001).

25 Stein, *supra* n. 18, at 297–312, 305.

26 *ILO standards and the UN Declaration on the Rights of Indigenous Peoples (Information note for ILO staff and partners)*.

27 Charters, *supra* n. 13, at 169.

been set aside, had the right to a fair trial had been invoked.[28] The right to a fair trial is protected under Article 6 of the European Convention on Human Rights (ECHR), which applies not only to criminal matters but also civil rights and obligations.[29] Under Article 6, it is admitted in certain limited cases (mainly arbitration), that an individual can waive a right, but not if he or she had no knowledge of the existence of the right or of the related proceedings.[30] Cases of forced relocation are therefore not likely to fall within the scope of the exemption. The right to a fair trial is also protected under Article 10 of The Universal Declaration of Human Rights.

3.2[c] *Public Liability: Leniency, Proof and Compensation Schemes*

It is relevant to address public liability briefly, as tort compensation may be a means of redress for indigenous peoples in cases where removal has already taken place.

While the fundamental conditions for liability are the same for public and private tortfeasors, a number of particular circumstances in the public sector play a role in liability cases. The fundamental conditions for both public authorities and private persons are: The existence of damage, a cause, causation (the link between the breach of duty and the damage occurred), as well as legal causation.[31] The particular circumstances when dealing with public liability in cases of claims in connection with forced removal are mainly: *1. the difficulties of performing public tasks* and *2. the impact of the principle of separation of powers in tort law cases involving public authorities*. Taken as a whole, these factors seem to make the public liability more lenient from a general viewpoint[32]:

- The argument of public tasks being *difficult to perform* (1) implies that public authorities are only held liable, when they have committed gross negligence.[33] The motivation is that courts, by imposing a liability that is too strict, may risk 'paralysing' public administration.[34]
- The *principle of the separation of powers* (2) probably also plays a role, at least in some cases. In this viewpoint, political decisions (such as the forced removal) is a decision for politicians to make and not for the

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28 Spiermann, *supra* n. 5, at 572–578.
29 *Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Civil Limb)*, https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf (accessed 9 Sep. 2022).
30 *Schmidt v. Latvia*, European Court of Human Rights (27 Apr. 2017).
31 *See* further K. Oliphant, *The Liability of Public Authorities in Comparative Perspective* (Intersentia 2016).
32 *See also* M.-L. Holle, *Discerning Policy in Public Liability*, (3) Revue internationale de droit comparé (Juillet-Septembre 2016).
33 P.-L. Frier & J. Petit, *Droit administratif* 562–563 (L.G.D.J. 2015).
34 *Ibid*., at 609.

> judges to remake, scrutinize and sanction. In French law, the dilemma is coined as: '*Juger l'administration c'est encore administrer.*',[35] meaning that judicial review of administrative action is still administering. This is an ever-present dilemma, because the separation between the executive and the judiciary is the very separation of powers.[36]

Applied to claims arising from forced relocations, these factors may be thought to have a mitigating effect. As for the first factor (1. public tasks as being difficult to perform) is it true that courts, speaking generally, often will be seen to hold public authorities up to a standard of negligence that is more lenient than that of private persons, at least under national tort law. Moreover, this may lead to claims that are awarded being relatively lower or that conditions as to the existence of the claims become harder to prove. As for the second factor (2. The principle of the separation of powers) may lead one to think that national courts may be reluctant to criticize government authorities having carried out the forced relocation. However, the impact of human rights is significant, as courts in states bound by international human rights instruments cannot disregard these. Especially not since cases of forced removal touches upon fundamental rights and freedoms, such as that of respect of private and family life, home and possessions. A previously mentioned, human rights are recognized as a source of law, and they set or standardize the interpretation of national tort law.[37] Further to this point, the existence of legal regulation, such as the ILO Convention (also addressed under 2.2 and 3.2[a]) is also likely to affect the standard of negligence (factor 2). The mechanism in national tort law is often that the existence of regulation makes the standard of care stricter.

While issues of proof have not been object of regulation on indigenous peoples' rights yet, at least to the knowledge of this author, it is certainly an option to be examined. The burden of proof (not to mention the length of procedures), mainly resting on the part of the indigenous people, without appropriate financial

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[35] The adage is attributed to the French lawyer and politician, *Henrion de Pansey* (1774–1829), *see* further B. Pacteau, *Le contrôle de L'administration – Le contrôle par une juridiction administrative – Existence ou non d'une juridiction administrative – La conception française du contentieux administratif*, 53(3) La Revue Admin. 91–105 (2000). Le contrôle de L'administration Le contrôle par une juridiction administrative Existence ou non d'une juridiction administrative La conception française du contentieux administratif Le contrôle de L'administration Le contrôle par une juridiction administrative Existence ou non d'une juridiction administrative La conception française du contentieux administratifLe contrôle de L'administration Le contrôle par une juridiction administrative Existence ou non d'une juridiction administrative La conception française du contentieux administratifLe contrôle de L'administration Le contrôle par une juridiction administrative Existence ou non d'une juridiction administrative La conception française du contentieux administratif53e Année, No. 3, Numero special 3: L'élaboration du droit Le contrôle de l'administration (2000), at 91–105.

[36] *See also* A. Bang & M.-L. Holle, *Making Legal History: State Liability for Negligence in Climate Change*, 26 (1) Eur. Pub. L. 45–58 (2020).

[37] Christoffersen, *supra* n. 24; Justesen, *supra* n. 24.

support, is a common hindrance to indigenous claims.[38] In court cases, courts can contribute to the improvement of plaintiffs' likelihood in succeeding in their claims by adjusting the burden and the standard of proof. Rules on the burden of proof are sometimes used as a means to achieve purposes of material law. If courts require that the burden of proof is reversed, so that it lies with public tortfeasor, this may come close to imposing strict liability,[39] and therefore be helpful to the plaintiff. Reversing the burden of proof means that negligence is presumed, and it is for the public authority to show absence of fault. Another option is lowering the standard of proof in order to make it easier for the plaintiff to meet the burden of proof.

In many countries, there is a tendency towards socialization of risk giving rise to the creation of government-funded compensation schemes.[40] Examples of these schemes range from those created in the wake of contaminated blood scandals, where a number of patients were contaminated with HIV to nuclear tests, terrorism, asbestos, and violence victims.[41] These are legal rules whereby compensation is accelerated and to a certain extent almost automatically awarded. Therefore, they are comparable to insurance schemes. Under such compensation schemes, claimants need only demonstrate that they have suffered a damage at a certain period of time and under certain circumstances. It is important to mention that these compensation schemes are a political choice rather than a legal matter.

3.2[d] *Is It Still Uphill from Here?*

If past behaviour is the best predictor of future behaviour … Then yes, it is still uphill. Many of the wrongdoings committed against indigenous groups have been done before the widespread acknowledgement of the value of human beings and human rights.[42] Indigenous peoples are now faced with the challenge of implementing international standards within national spaces.[43] The topic of indigenous peoples' rights is not only an issue of past injustices – yet much is in fact such – but also increasingly one of current concerns in the human rights field.[44]

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38 I. Bellier & M. Préaud, *Emerging Issues in Indigenous Rights: Transformative Effects of the Recognition of Indigenous Peoples*, 16(3) Int'l J. Hum. Rts. 474–488 (2011).

39 V. G. Ulfbeck & M.-L. Holle, *Tort Law and Burden of Proof: Comparative Aspects. A Special Case for Enterprise Liability?*, in *European Tort Law 2008* 26 (Springer 2009).

40 J. Waline, *Droit administratif* 483 (25ème éd., 483 Dalloz 2014).

41 *See* for French law: A. Frank, *Le droit de la responsabilité administrative à l'épreuve des fonds d'indemnisation* (L'Harmattan 2008); for Danish law: B. von Eyben & H. Isager, *Lærebog i erstatningsret* 373–375 (DJØF, 9th ed. 2019).

42 D. Shelton, *Reparations for Indigenous Peoples: The Present Value of Past Wrongs*, in *Reparations for Indigenous Peoples: International and Comparative Perspectives* 49 (F. Lenzerini ed., Oxford University Press 2008).

43 Bellier & Préaud, *supra* n. 38, at 474–488.

44 R. Stavenhagen, *How to Decolonize Indigenous Rights*, 8(1) Latin Am. & Caribbean Ethnic Stud. 97–102 (2013).

The consequences of many of the past actions continue into the present. In 2006, UN High Commissioner on Human Rights stated that even at present:

> *[I]ndigenous peoples are discriminated against within society, have generally weak political participation and lack equal access to economic, social and cultural rights. They may be harmed by or excluded from development projects and do not benefit fully from strategies to meet the Millennium Development Goals and to reduce poverty. They have less access to justice and security and are often implicated in conflict. They are also victims of serious human rights violations. National legislation may result in direct or indirect discrimination against them. Where laws to protect and promote their rights do exist, these are often not implemented in practice.*[45]

Experiences show that indigenous plaintiffs seeking redress have sometimes been unable to do so, because of practical and political obstacles, such as concealed or missing evidence.[46] This was also the case with the Thule tribe.[47] Sometimes statutory limitation may bar litigation, and issues with evidence may complicate matters. Indigenous people may have difficulties in overcoming statutory limitation periods and in locating evidence, particularly when governments have been lax in recording matters involving indigenous people. Other procedural difficulties include the enormous financial cost and the length of time before the outcome of litigation is finalized.[48]

Tort law has a principal end of either prevention of or compensation for loss. Payment of damages is a symbol of moral condemnation of the events and actions occurred.[49] In preventing loss, the general idea is that the tortfeasor should be persuaded from acting negligently due to the threat of having to pay compensation. In this specific context – being the relocation of (indigenous) populations – compensation levels are likely far from high enough to give public authorities an incentive to avoid taking such steps, as compensations take up very little of the public finances. On a counterbalance, the political wish to grant requests, such as the American one regarding the Thule Air Base, may be ever so strong. Admitting that tort law does have the function of converting negative effects to money, it is still true that it is hard to put a price tag on losing one's homeland and the land of one's forefather.

In the classic sense, tort law has a paradigm of an individual tortfeasor, an individual plaintiff, and quantifiable losses fitting under the heading of either physical damage, financial loss or property damage. Such widespread wrongdoings

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45 *Report of the High Commissioner for Human Rights on Indigenous Issues*, E/CN.4/2006/77, 3 (27 Feb. 2006), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/112/83/PDF/G0611283.pdf?OpenElement (accessed 9 Sep. 2022).

46 Shelton, *supra* n. 42, at 48.

47 J. Brødsted, *Thules forsvundne erstatningssag*, Ugeskrift for retsvæsen U 2000B.621 (2000).

48 C. Cunneen, *Colonialism and Historical Injustice: Reparations for Indigenous Peoples*, 15(1) Soc. Semiotics 59–80 at 68 (2005).

49 Shelton, *supra* n. 42, at 48.

as those experienced by an indigenous people subjected to forced removal are difficult to redress through the traditional paradigm. The span between widespread historical violations and individual claims are simply too large. Furthermore, statute of limitations and the principle against non-retroactivity of law pose further difficulty.[50]

As noted by other scholars, no international legal instrument vest peoples (nor communities or individuals) with a 'human right to land'. Therefore, the explicit incorporation of land rights in indigenous and tribal rights legal instruments is an important step toward the entrenchment of land rights as human rights.[51] The rights need to possess legal capacity also for communities. *Anaya* states that the legal trend is leaning toward the inclusion of legal entitlements to indigenous peoples as collective entities.[52]

One should also bear in mind that indigenous peoples' lifestyles just like any other people develop over time; a paternalistic way of thinking would be that an indigenous people could only maintain distinctive rights to self-determination, if they maintain a traditional way of life. Thereby, one implies that indigenous peoples not only have a different way of life, but also that they cannot safely be exposed to other ways of life, and they are incapable of making an informed judgment as to their way of life.[53]

One may consider a reparations tribunal or commission as an alternative to the traditional legal system to provide a response to injustice. Reparations are an intermediary form between law and justice. According to Cunneen: 'a way of overcoming the limitations of the law of the coloniser and its inability to meet the demands for justice from the colonized'.[54] Cunneen suggests the body should have three divisions: (1) A Hearing Division, assisting peoples in establishing the facts. This may be highly necessary even in modern times, as the Thule case testifies, the necessary documents being claimed missing for a long time[55]; (2) A Rehabilitation and Reparations Division, which would make decisions about entitlement to reparations for individuals and communities; and (3) A Recommendations Division, which would focus on providing solutions to current government practices.[56,57] These might include issues such as making recommendations on improving and preventing future unlawful or otherwise inappropriate measures taken against indigenous people.

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50 *Ibid*.
51 Stein, *supra* n. 18, at 297–312, 302.
52 S. J. Anaya, *Superpower Attitudes Toward Indigenous Peoples and Group Rights*, in *Proceedings of the Annual Meeting*, 93 Am. Soc'y Int'l L. 256 with footnote 16 (24–27 Mar. 1999).
53 W. Kymlicka, *Politics in the Vernacular* 10 (Oxford 2000).
54 Cunneen, *supra* n. 48, at 59–80.
55 Brødsted, *supra* n. 47.
56 Proposal from Cunneen, *supra* n. 48, at 59–80, 74.
57 Shelton, *supra* n. 42, at 51.

Acknowledgement and apology are other remedies, which according to some have proven effective in Australia. These include the recording of the testimonies of indigenous people affected by the forced removals, commemoration of the events, and apologies.[58] Apology as a form of reparation should not stand alone; an apology has value as it acknowledges the suffering of victims, which may in itself be restorative and help promote better relations in the present between the indigenous group and the rest of the population.[59]

While the loss of lands can probably never be adequately compensated, some monetary compensation for the harm that had been suffered can be useful means and especially along with the recognition of the responsibility for the causes of that harm. A national body having the purpose to consider and allocate compensation would make an alternative to litigation and would perhaps avoid not only inequality among plaintiffs, but also inequity among states as to their approach to compensation.[60]

In recent years, international law is developing in favour of indigenous peoples; international actors' focus generate understanding for the demands and needs of indigenous peoples. This can be seen in several concrete developments, including the Convention on Indigenous and Tribal Peoples, and the efforts at both the United Nations and the OAS (the Organization of American Sates) to create declarations on the rights of indigenous peoples.[61]

58 Cunneen, *supra* n. 48, at 59–80, 66.
59 Shelton, *supra* n. 42, at 49.
60 Cunneen, *supra* n. 48, at 59–80, 67.
61 Anaya, *supra* n. 52.