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Note

Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights

Sean Burke*

INTRODUCTION

Since the advent of the Inter-American Commission of Human Rights (IACHR/ “the Commission”) and the Inter-American Court of Human Rights (IACtHR/ “the Court”),¹ these two organs of the Organization of American States (OAS) have addressed human rights promotion and protection in the member States of the OAS.² Together, the IACHR and the IACtHR comprise the Inter-American System (IAS).³ For over twenty years they have been developing legal theories focused on the plight of indigenous populations within the region of the American States.⁴ While the IACtHR has found in claimants’

* J.D. Candidate 2011, University of Minnesota Law School; B.A., Creighton University, 2004. The author would like to thank the staff and editors of the journal, especially all those who helped improve this note.

1. The OAS created the IACHR in 1959 to observe and report on the general human rights situation in member states of the OAS, in fulfillment of the Declaration of the Rights and Duties of Man, the first human rights instrument introduced in the Americas in 1948. In 1965, the IACHR was authorized to examine petitions alleging human rights abuses in member states. Then, after it adopted the American Convention of Human Rights in 1969, the OAS created the IACtHR as a judicial forum in which to adjudicate cases of human rights abuses brought against states which are parties to the Convention. See *What is the IACHR?* INTER-AM. COMMISSION HUM. RTS., ORG. AM. STS., <http://www.cidh.oas.org/what.htm> (last visited Aug. 3, 2010).

2. *Id.*

3. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 259 (2nd ed. 2004).

4. See *id.* at 32–33 (discussing the inclusion, first in 1972 and more consistently since 1993, of indigenous issues in country reports issues by the

favor in indigenous claims of property rights, protection under the law, and right to life,⁵ the history of reparations reveals an inconsistency in the provision of adequate compensation for these claims.⁶

Currently, the IAS faces difficulties ensuring justice for indigenous claimants. Often, the IAS responds to claims in an untimely fashion and the abuses in the original claim generally continue to occur even after favorable judgments.⁷ The IAS needs new strategies in order to address these two threats to indigenous claimants' access to justice.

At the same time, the IAS recognizes that the influx of new claims has hampered the adjudicative bodies' effectiveness to address the claims.⁸ One proposal to deal with this problem is the increased use of friendly settlement mechanisms.⁹ A variety of factors suggest that such mechanisms will become important tools for improving the effectiveness of all regional human rights bodies, including the IAS. While the IAS has yet to

IACHR); *see also id.* at 259–71 (providing an overview of the IACHR and IACtHR jurisprudence on indigenous rights). These theories have centered on the use of reparations as the mechanism for redress of the various abuses perpetrated against these populations. *Id.* *See generally* *Q&A: Indigenous Rights Appeals Increasingly Reach Inter-American System*, IPS NEWS (Oct. 8, 2009), <http://ipsnews.net/news.asp?idnews=48775> [hereinafter, *Q&A*] (describing how indigenous communities are increasingly accessing the Inter-American Human Rights System).

5. *See* S. JAMES ANAYA, *supra* note 3, at 267–68 (discussing cases that have reached the IACtHR, specifically that of the *Awas Tingni* in Nicaragua, and the Court's judgments therein).

6. *See id.* at 269 (noting that reparations in the *Awas Tingni* case were problematic for a number of reasons, including the calculation of the sum and the implementation of the Court's orders).

7. *Cf.* Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 104 (2008) (noting the "rate of compliance with the remedial orders in the Inter-American system is lower than in the European system").

8. *See Address by the President of IACHR, Paulo G. Carozza*, INTER-AM. COMMISSION HUM. RTS., ORG. AM. STS. (JUNE 3, 2008), <http://www.cidh.org/Discursos/06.03.08eng.htm> [hereinafter *Carozza*] (addressing the need to find creative methods in managing an increasing backlog of cases before the Commission).

9. *Id.* (discussing a proposed project intended to increase the use of friendly settlements in the Commission). Friendly settlements are a common feature of international human rights systems and represent the primary manner in which parties may agree to a resolution of the dispute. The European and IAS systems require Court approval of the settlement to confirm that it conforms to applicable human rights laws. *See* JO M. PASQUAALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 149 (Cambridge University Press 2003)

decide on a comprehensive settlement mechanism, improving the use of indigenous reparations claims by borrowing aspects of other settlement techniques provides one avenue for better efficiency and justice.

Part I of this Note describes the hurdles facing indigenous claimants in the IAS, while Part II introduces tools of international dispute resolution. Part III of this Note lays out the broad foundations for using such tools to transform indigenous reparations into a type of friendly settlement mechanism and explains how such a mechanism provides a better method of resolving indigenous property rights claims in the IAS than the current system.

I. CHALLENGES OF IMPLEMENTING INDIGENOUS REPARATIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The path for an indigenous claimant seeking redress in the IAS is challenging. The claims of the Yakye Axa, an indigenous people in Paraguay, exemplify the difficulties claimants often encounter.¹⁰ Like many indigenous groups throughout Latin America, the Yakye Axa have suffered systematic discrimination, oppression, and isolation at the hands of various regimes.¹¹ Even after the decline of twentieth century despotic governments and the establishment of international norms recognizing various rights of indigenous populations,¹²

10. Along with the Yakye Axa, another indigenous group, the Sawhoyamaya, also won a favorable judgment from the IACtHR that was not implemented by the Paraguayan government. See *'We're Only Asking for What is Ours' Indigenous Peoples in Paraguay - Yakye Axa and Sawhoyamaya*, AMNESTY INT'L 3 (Mar., 2009), <http://www.amnesty.org/en/library/info/AMR45/005/2009/en> (follow "Download: PDF" hyperlink) [hereinafter AMNESTY] (noting the failure of the Paraguayan government to respect the IACtHR's judgments). In August of 2010, the IACtHR ruled against Paraguay for a third time in the context of indigenous rights when it found the government had violated the right to life, communal property, and judicial protection of another indigenous group, the Xakmok Kasek people. See *Case of the Xakmok Kasek Indigenous Community v. Paraguay*, 2010 Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

11. *Id.* at 2 (profiling the plight of Paraguay's Indigenous population, including the Yayke Axa).

12. See generally S. JAMES ANAYA, *supra* note 3, at 49–184 (documenting the development and content of contemporary human rights norms protecting indigenous peoples). For a historical assessment about the lack of State recognition of international attempts to recognize indigenous populations, see Anaya's analysis of international norm development. *Id.* at 34 (arguing that early international law efforts to recognize indigenous rights "succumbed to a state-centered Eurocentric

domestic judicial and political structures have not consistently protected the rights of indigenous groups such as the Yakye Axa. The destruction of indigenous lands, and the inability and unwillingness of governments to reclaim them from third-party landowners,¹³ represent significant barriers contributing to delayed domestic justice. Unsuccessful domestic legal battles led the Yakye Axa to seek international adjudicative solutions from the IAS.¹⁴

In 2005, after nearly twelve years of adjudication in Paraguayan domestic courts and the IAS, the Yakye Axa won a favorable judgment from the IACtHR.¹⁵ The IACtHR found violations of the Yakye Axa's rights to judicial protection, property, and life.¹⁶ Despite the IACtHR's ruling, however, the deadline for the Paraguayan government's compliance with the judgment has passed.¹⁷ The struggle of the Yakye Axa represents the basic challenges of claimants seeking justice including: navigating the long and unpredictable domestic and international judicial processes, fighting for appropriate reparations standards, and ultimately having a successful claim rendered worthless through ineffective enforcement of the judgment.

A. WAITING FOR JUDGMENT

The primary obstacles facing claimants such as the Yakye Axa are the time and resources necessary to bring a claim to the IAS. A fundamental principle of regional human rights adjudication is that claimants must first exhaust all domestic remedies before going to the IACHR.¹⁸ Even after meeting this and other preliminary qualifications,¹⁹ resolution requires a

system that could not accommodate indigenous peoples and their cultures as equals").

13. See AMNESTY, *supra* note 10, at 5 (discussing Congressional opposition to measures to restore the land to the Yakye Axa).

14. *Id.* at 2.

15. Case of the Yakye Axa Indigenous Community v. Paraguay 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

16. *Id.* at §§ VIII–X. See also *Yakye Axa v. Paraguay*, RT. TO EDUC. PROJECT, <http://www.right-to-education.org/node/679> (last visited Jan. 12, 2010) (summarizing the basic rulings of the court).

17. AMNESTY, *supra* note 10.

18. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, art. 46(1)(a) (1992) [hereinafter Convention]. See generally *What is the IACHR?*, *supra* note 1.

19. Convention, *supra* note 17, art. 46(1)(b) (the filing must come "six months

long waiting period due to the existing backlog of cases facing the IAS.²⁰

An increase in the volume of claims in recent years has slowed the pace of the IAS. Between 2004 and 2008, over 1,300 complaints were filed with the Commission each year;²¹ in 2009, only 122 petitions were processed.²² This backlog has forced concerned administrative officials to begin to look toward alternative measures of dispute resolution to solve the basic problems caused by the influx in pending cases.²³ The current backlog will likely deny claimants timely and efficient justice.

The current caseload of the IACHR suggests that new developments in settlement mechanisms will be necessary to improve the overall effectiveness of the systems.²⁴ Currently, the IACHR allows for a procedure called friendly settlement.²⁵ The procedure, which the IACHR was originally reluctant to utilize, allows States to avoid the publication of an unfavorable report by agreeing to reach a friendly settlement with the complaining party.²⁶ The authority of the IACHR to induce States to settle human rights claims is generally understood as persuasive rather than binding authority.²⁷ Since the language

from the date on which the party alleging violation of his rights was notified of the final judgment"); *id.* art. 46(1)(c) (the subject matter must not be in the process of adjudication in another international proceedings); *id.* art. 46(1)(d) (the filing must contain basic logistical information).

20. See generally *What is the IACHR?*, *supra* note 1.

21. Inter-Am. Comm'n of Human Rights, Annual Report 2009, ch. 3(B)(1)(d), OEA/Ser.L/V/II 134, Doc. 5, rev. 1 (Feb. 25, 2009). Complaints include all written complaints regarding a supposed violation of a relevant human rights instrument. Over 2,000 petitions in 2009 were evaluated. *Id.* at ch. 3(B)(1)(d).

22. *Id.* at ch. 3(B)(1)(c). In all 1,450 cases are pending before the Commission as of the end of 2009. *Id.* at ch. 3(B)(1)(g).

23. See Carozza, *supra* note 8. In his 2008 address on the state of the Commission, the President of the Inter-American Commission listed the measures the Commission was taking to help ease the financial and administrative burden of protecting human rights in the region. *Id.*

24. *Id.*

25. *Rules of Procedure of the Inter-American Commission on Human Rights*, INTER-AM. COMMISSION HUM. RTS., ORG. AM. STS., art. 40 (Oct. 28-Nov. 13, 2009), <http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm> [hereinafter *Rules of Procedure*].

26. See Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT'L L. 521, 523 (1999).

27. See Generally ORGANIZATION OF AMERICAN STATES, THE HUMAN RIGHTS SITUATION OF THE INDIGENOUS PEOPLE IN THE AMERICAS (2000), available at <http://cidh.oas.org/Indigenas/TOC.htm> (stating that the Commission will only facilitate settlement during the indigenous claims procedure "for a fixed period of time...[and only] if the parties are so disposed...").

of Article 48(1)(f) of the American Convention of Human Rights simply states that the Commission “shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement,”²⁸ the impetus falls on the States to demand and/or agree to settlement proceedings on their own accord and without any mandatory ruling from the IACHR. Although logistical questions of resources and willpower may affect the eventual scope of a settlement regime, a key obstacle to the implementation of these mechanisms is the ability of the IAS to mandate and push for settlements.²⁹ Many scholars believe, however, that the IAS will begin to implement some type of stronger friendly settlement mechanism, though no one has indicated what friendly settlement system that may be.³⁰

B. DEVELOPING AND ENFORCING AN APPROPRIATE REPARATIONS STANDARD FOR PROPERTY CLAIMS

As evidenced by the IACtHR’s ruling in favor of the Yakye Axa’s property rights, the current regional and international³¹ standards for reparations represent a significant improvement over previous remedies available to indigenous communities.³² This evolution has also occurred as Latin American governments have taken their own initiative to interpret

28. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

29. See *Rules of Procedure*, *supra* note 25, at art. 40.2 (clarifying that parties initiate and ultimately control the continuation of any friendly settlement process).

30. See *generally* Standaert, *supra* note 26, at 523–24 (highlighting problems with the friendly settlement system).

31. International human rights movements have made significant strides in utilizing and evolving the reparations concept away from simply a small monetary compensation. See Arturo J. Carrillo, *The Relevance of Inter-American Human Rights Law*, in *THE HANDBOOK OF REPARATIONS* 512–27 (Pablo De Greiff ed., 2006) (analyzing the types of reparations awarded by the IACtHR to human rights victims).

32. See Organization of American States, *Principal Guidelines for a Comprehensive Reparations Policy*, 1–2, Inter-Am. Comm’n H.R. OAE/Ser/L/V/II.131, doc. 1 (Feb. 19, 2008); See also Interview with Victor Abramovich, *supra* note 4 (quoting from the special Rappatour who sees improvements over previous reparations systems because “[t]he system is consolidating a collection of principles, and achieving the resolution of particular cases, through friendly settlements or precautionary measures.”). See *generally* Conference, *Reparations in the Inter-American System: A Comparative Approach*, 56 Am. U. L. Rev. 1376 (2007) available at http://www.wcl.american.edu/journal/la_wrev/56/reparations.pdf?rd=1 (tracing the development, evolution, and effectiveness of the IAS’s reparations jurisprudence).

human rights norms³³ and orchestrate reparations programs.³⁴

While there is not a bright line standard set in the Inter-American system,³⁵ the IACHR has generally held that just compensation:

[S]hould materialize in the form of individual measures calculated to constitute restitution, compensation and rehabilitation for the victim, as well as general measures of satisfaction and guarantees of non-repetition. False[R]eparations should consist of measures that tend to make the effects of the violations committed disappear. Their nature and amount will depend on the damage caused both at the pecuniary and non-pecuniary levels. Reparations cannot involve enrichment or impoverishment of the victim or his or her heirs.³⁶

In order to evaluate appropriate remedies within this standard, an adjudicative body must determine the source of law by which to judge the merits of the case. Aside from violations of judicial protection, this choice of law generally falls between two broad categories; indigenous property and indigenous right to life claims.³⁷

The various characteristics of right to life claims may make them less suitable for the current settlement procedures offered by the IACHR.³⁸ Some advocates recognize that settlement options in these types of claims are limited, and ultimately self-defeating.³⁹ Claimants and other advocates of indigenous rights may also wary of the bargaining and negotiation aspects of

33. See Neuman, *supra* note 7, at 114–15.

34. See U.N. High Comm'r for Refugees, Minorities at Risk Project, *Assessment for Indigenous Peoples in Honduras*, (31 December 2003) <http://www.unhcr.org/refworld/docid/469f3a8d2b.html> (recognizing an improvement in living conditions for the Miskito people, a Honduran Indigenous minority group, since the late 1980s).

35. See Organization of American States, *Principal Guidelines for a Comprehensive Reparations Policy*, *supra* note 31, at 1.

36. *Id.* at 2 (noting "The State must play a primary, rather than secondary, role in guaranteeing victims' effective access to reparations, in accordance with the standards of international law.")

37. See American Convention, *supra* note 28 (defining the right to life and right to property). The IACtHR ruling in favor of the Yakye Axa divided the violations into three categories: property, life, and judicial protection. See case cited *supra* note 15.

38. See Standaert, *supra* note 26, at 520 (noting that mediation in the context human rights adjudication may not fully encourage respect for human rights because of the crimes are horrific, the abusers are not held criminally accountable, and victims may not feel a sense of justice).

39. See *id.* at 530–32.

dispute resolution when the other stakeholders have perpetrated heinous crimes against the fundamental human rights of indigenous peoples.⁴⁰

Reparations advocates have experienced success in developing a systematic jurisprudence of indigenous property rights against various other actors.⁴¹ With the pattern of abuse stretching from the colonization of the western hemisphere, indigenous groups have found themselves with little recourse to reclaim lands held by large territorial landowners, businesses, and the government itself.⁴² States' growing interest in minerals and valuable property has continued to render indigenous land an attractive target for exploitation. Working in concert with or with the tacit permission of State authority,⁴³ landowners are often successful in repressing indigenous protests and attempts to reclaim such lands or assert their rights.⁴⁴ For example, in the case of the Yakye Axa, the third party landowners were able to convince legislative authorities to table the executive branch's request to carry out the IACtHR's judgment.⁴⁵ Even more prevalent are claims that a State acted in its official capacity to destroy indigenous communities.⁴⁶ Despite these obstacles, progress has been

40. See *id.* at 528 (noting that the power imbalance between individual and state parties represents a grave challenge in mediation's ability to secure human rights).

41. Ruth Rubio-Marín, *Gender and Collective Reparation in the Aftermath*, in *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 381, 385–87 (Ruth Rubio-Marín ed., Cambridge University Press 2009) (laying out a theory of collective reparations focused on group characteristics, such as indigenous culture); See generally Organization of American States [OAS], *The Human Rights Situation of the Indigenous People in the Americas*, Inter-Am. OEA/Ser.L/V/II.108, Doc. 62, Ch. 1 (2000), available at <http://www.cidh.org/indigenas/chap.1.htm> (outlining the history of indigenous jurisprudence in the IACHR).

42. See S. JAMES ANAYA, *supra* note 3, at 142 (noting that early international property law recognized indigenous land rights via historical use but allowed for termination of such rights through unilateral government action or simple monetary transfers).

43. See generally AMNESTY, *supra* note 10, at 2–5 (explaining how governmental authorities have failed to restore land to the indigenous people).

44. See *id.* at 5.

45. *Id.*

46. See Inter-Am. Comm'n H.R., *Community of Rio Negro of the Maya Indigenous People and its Members*, <http://www.cidh.oas.org/annualrep/2008eng/Guatemala844.05eng.htm> (detailing how the Guatemalan government ordered armed forces to violate the right to property and the right to life of the Maya indigenous community at the Río Negro so as to secure the land for the use of a Hydro-electric dam).

noticeable, at least in the recognition of international norms protecting indigenous rights to property, cultural integrity, nondiscrimination, and self-determination.⁴⁷ Scholars, activists, and even some court decisions are beginning to recognize not only real property claims, but also intellectual property claims.⁴⁸

Even when indigenous claimants win a favorable judgment in the IACHR or the IACtHR, however, the IAS struggles to implement and enforce the judgment.⁴⁹ Once a claimant brings the claim into the Inter-American human rights system, the State is generally less cooperative than if it had taken the initiative to set up a reparations program on its own.⁵⁰ If the parties reach a friendly settlement agreement that the IACHR approves,⁵¹ the State may still stall or refuse to implement the agreed upon measures of reparation.⁵² These tactics range from

47. S. JAMES ANAYA, *supra* note 3, at 142.

48. The current movement to have indigenous customs recognized in intellectual property law represents the most recent trend in indigenous rights activism. This relatively new movement represents a significant increase in awareness of indigenous rights, but does not mean the more significant claims of real property have primarily been met. See Maui Solomon, *Intellectual Property Rights and Indigenous Peoples Rights and Obligations*, <http://www.inmotionmagazine.com/ra01/ms2.html#Anchor-Introduction-15970> (last visited Oct. 19, 2009) (arguing the indigenous framework of property rights incorporates a principle of reciprocity, so that obligations of the cultural tradition are balanced against the right to use and exploit cultural values including real property).

49. At a Conference discussing challenges to implementation, then Secretary of the IACHR, Santiago A. Canton, stated
Apart from Colombia and Peru—which have adopted some legislation to effect compliance with certain aspects of international judgments and reports in individual cases—there are no other examples of institutional mechanisms designed to comply with reparations granted in the Inter-American system. Today, the Commission's recommendations on individual cases are complied with only when there is a combination of political will and a search for creative ways to comply even if the measures adopted are not technically permitted under domestic law.
Reparations in the Inter-American System: A Comparative Approach, *supra* note 32, at 1455.

50. See Generally International Center for Transitional Justice and Human Rights Association, *Design Parameters for a Reparations Program in Peru* (Sept. 2002) <http://www.ictj.org/static/Americas/Peru/Parameters.eng.pdf> (suggesting that the most successful reparations programs have been those developed by governments themselves and not those mandated by international arbitration bodies).

51. See *Rules of Procedure*, *supra* note 25, at art. 40.5 (explaining how the IACHR verifies that the claimants have agreed to the settlement and that the resolution is “based on respect for the human rights recognized in the American Convention on Human Rights”).

52. See Natalia Ruiz Díaz, *Int'l Backing for Indigenous Land Claims*, INTER

designating the disputed land as protected preserves,⁵³ citing domestic property laws as obstacles to reparation, and deferment of the issue to State legislatures where the influence of third party landowners and corporations often stall proceedings.⁵⁴ Even if the government acquiesces to a judgment, it often claims a lack of power to effectuate or compel the cooperation of the landowner.⁵⁵ In addition, those government officials who attempt to implement IAS judgments or recommendations may find themselves in danger of prosecution.⁵⁶ In the case of the Yakye Axa, the State used the tactic of deferring the matter to its legislative process.⁵⁷

II. THE ECHR'S SPECIALIZED FRIENDLY SETTLEMENT TOOLS

Many scholars and practitioners recognize the underdeveloped use of dispute resolution tactics in areas of international law, particularly outside the realm of international economic agreements.⁵⁸ However, the concept of friendly settlement has not been completely abandoned in contentious proceedings, as evinced by the European Court of Human Rights (ECHR), where friendly settlement is used with

PRESS SERVICE NEWS AGENCY, Oct. 9, 2009 *available at* <http://www.ipsnews.net/news.asp?idnews=48789> (outlining the delayed implementation of government-promised reparations to indigenous communities).

53. *Id.* (noting that the Paraguayan government declared part of previously promised land a protected preserve so as to prevent the indigenous community from claiming all of the granted territory).

54. *See* AMNESTY, *supra* note 10, at 5 (detailing the Paraguayan Congress' tabling of legislation designed to pass into law a bill already signed by the president giving lands to the indigenous peoples of Yakye Axa and Sawhoyamaya).

55. *See Id.* (highlighting the stalled political process even after presidential approval of the transfer of land to the Yakye Axa indigenous community).

56. *Reparations in the Inter-American System: A Comparative Approach*, *supra* note 32, at 1455.

57. *See* AMNESTY, *supra* note 10, at 11. At this stage of the claim, the Court rendered a favorable judgment and the government tried to acquiesce to the judgment. Nevertheless, the standard of reparations was still not met. These are the claims that require the most attention and creative problem solving from reforms attempting to increase the effectiveness of the reparations process.

58. *See* Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law-Lessons for Strengthening International Dispute Settlement in Non-economic Areas*, 2.2 J. INT'L ECON. L. 189, 191-92 (1999) (arguing that there are many lessons to be learned by international lawyers working within the UN and ICJ procedures concerning human rights from compulsory adjudication methods common in international economic law).

some success.⁵⁹ The difficulty lies in transferring this relative success into gainful settlements of the specific claims of indigenous peoples.

A. ECHR MECHANISMS FOR SETTLEMENTS

The ECHR, as an adjudicative body dedicated to resolving human rights claims,⁶⁰ has much more experience than the IAS in dealing with friendly settlements between States and human rights victims.⁶¹ Despite the ECHR's under utilization of friendly settlements,⁶² it has developed relatively flexible and efficient procedures and enforcement mechanisms.

Rule 62 of the ECHR Rules of Court govern the initiation of friendly settlement proceedings by mandating that the Registrar "enter into contact with the parties with a view to securing a friendly settlement."⁶³ While similar language is present in the American Convention, the IACHR must only "make itself available" to the parties to assist with friendly settlement. Rule 54A in the European Convention goes on to state that the Court may require parties to include settlement proposals in the initial response phase of a joint procedure.⁶⁴ Finally, the newly authorized Protocol 14⁶⁵ will significantly change friendly settlements by permitting friendly settlement

59. See generally, COUNCIL OF EUROPE, ALTERNATIVES TO LITIGATION BETWEEN ADMINISTRATIVE AUTHORITIES AND PRIVATE PARTIES: CONCILIATION, MEDIATION, AND ARBITRATION 35–59 (2000) (introducing the main elements of the settlement process in the court).

60. Like the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the overarching structure and content for the European Human Rights system. See generally Gregory S. Weber, *Who Killed the Friendly Settlement? The Decline of Negotiated Resolutions at the European Court of Human Rights*, 72 PEPP. DISP. RESOL. L. J. 215, 215–17 (2007) (discussing the decline in friendly settlements after reaching its peak in 2002 and 2003).

61. See *Id.* This does not mean, however, that the ECHR utilizes friendly settlements as much or as effectively as possible.

62. *Id.*

63. Eur. Ct. H.R., *Rules of Court*, Rule 62(1) (2009) [hereinafter *Rules of Court*].

64. *Id.* at Rule 54A(1).

65. Before February of 2010, Russia blocked the passage of Protocol 14 based on fear that such advanced settlement procedures would increase pressure to settle various claims, including those brought by Chechnya. In June of 2010, Russia agreed to pass Protocol 14. See Haley Wojdowski, *Russia Upper House Ratifies Europe Rights Court Reform Protocol*, JURIST LEGAL NEWS AND RESEARCH, Jan. 27, 2010, <http://jurist.law.pitt.edu/paperchase/2010/01/russia-upper-house-ratifies-europe.php>.

negotiations even before the Court declares a case admissible.⁶⁶ In clarifying that completed friendly settlements end with a “judgment,” Protocol 14 ensures that The Committee of Ministers will have oversight of the enforcement of the agreement.⁶⁷

B. PILOT JUDGMENTS

Pilot judgments represent another recent development the ECHR implemented to increase the efficiency and efficacy of large-scale settlements.⁶⁸ Beginning with the first principle pilot judgment in 2005,⁶⁹ the ECHR has utilized this mechanism primarily to compel fledging democratic governments to align their judicial practices with the rule of law.⁷⁰

The first step in the process of a pilot judgment requires the ECHR to determine whether a large pool of potential claimants exist who will potentially have similar claims to that of the plaintiff in the case in question.⁷¹ The ECHR then rules on the “pilot case” and allows its judgment to impact the previously identified “class” of similarly situated parties.⁷² While the affected State party implements the appropriate solution as determined by the ECHR, all other cases in the similar “class” are paused until the Committee of Ministers confirms that the state in the pilot case implemented the original judgment.⁷³ If the Committee finds the implementation is successful, then the additional lawsuits continue with a

66. See Explanatory Report to the CETS 194, § IV, cl. 92 (2009) available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> [hereinafter *Explanatory Report*].

67. *Id.* § IV, cl. 94 (explaining that The Committee of Ministers may step in if either party shows signs of improper enforcement of the agreement).

68. See generally Eur. Ct. H.R., The Pilot-Judgment Procedure, http://www.echr.coe.int/NR/ronlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf. As a relatively new concept, scholars have recently begun to comment about the efficacy of this new mechanism. While most agree the ECHR has the proper authority to carry out pilot judgments, the debate focuses on whether such judgments represent long-term solutions to the efficiency of the Court or should only be used during the transition period for young democracies.

69. See generally *Broniowski v. Poland*, 2002-X Eur. Ct. H.R. 509, 510–38 (2004) (citing the case where the first principle pilot judgment was used.)

70. See *The Pilot Judgment Procedure*, *supra* note 68.

71. *Id.*

72. *Id.*

73. *Id.*

similar settlement.⁷⁴ This type of mechanism frees up the ECHR from various claims that will eventually settle after ECHR renders a pilot decision. In using this tool, the ECHR has compelled governments, such as Poland, to pre-emptively address certain cases before they are brought into the pilot judgment process.⁷⁵ The ECHR has already administratively disposed of more than twenty standing cases and potentially 1.1 million other individual claims.⁷⁶

After the parties agree to some type of friendly settlement in the ECHR, the Committee of Ministers ensures compliance with the agreement.⁷⁷ As the primary enforcement arm of the entire ECHR, the Committee of Ministers conducts periodic assessments to ensure parties implement friendly settlement agreements just as they would a judgment from the Court.⁷⁸ However, the Inter-American System, as an organ of the OAS, does not have a parallel body from which to seek help in enforcing its decisions.⁷⁹

III. THE FUTURE OF INDIGENOUS RIGHTS IN THE INTER-AMERICAN SYSTEM: THE CASE FOR A SETTLEMENT APPROACH

Indigenous reparations represent an opportunity to create a new type of friendly settlement mechanism that addresses the challenges indigenous claimants currently face. Along with the creation of such a mechanism, the IAS must foster a culture where friendly settlement can thrive and where all stakeholders recognize the importance of including indigenous reparations in the new creative process.

74. *Id.*

75. *Id.* The two principal pilot judgment cases both involve Poland and were friendly settlement decisions issued in 2005 and 2008. *Broniowski v. Poland*, (plaintiff was suing for compensation of his land that had been “repatriated” after Polish agreements with Ukraine).

76. Eur. Ct. H.R., *Cases or Groups of Cases against Poland*, 2–4 (2009), http://www.coe.int/t/e/human_rights/execution/03_cases/Poland_en.pdf.

77. *Rules of Court*, *supra* note 63, at Rule 43 (reiterating the Committee of Ministers’ role in supervising settlement enforcement).

78. The Committee derives its mandate and funding from the EU. *Id.*

79. See Robert K. Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856, 882 (2009) (contrasting the work of the Committee of Ministers in the ECHR with OAS’s lack of political pressure on offending governments and arguing that this lack of enforcement stands as a key challenge to the effectiveness of the IACHR).

A. CREATING A SETTLEMENT MECHANISM INFORMED BY INTERNATIONAL PRACTICE

The ECHR's advanced jurisprudence, significant case log, creative settlement practices, and stronger settlement rules and procedures have helped create a more dynamic and prolific system of settlement procedures than the IAS.⁸⁰ All settlement mechanisms developed by the Inter-American Commission should look to these European practices for guidance. The most significant systems in place with regard to the indigenous issues by the ECHR consist of the pilot judgments and the ECHR's new rules and procedures, particularly Protocol 14, requiring parties to engage in settlement negotiations even before a claim is deemed admissible.⁸¹ Adopting this particular procedure would allow for quicker resolution of indigenous claims because it would funnel them into the indigenous pilot judgment reparation mechanism before entering the general pool of claims to the IACHR.

Because of the lack of indigenous issues facing the ECHR, any settlement mechanism based primarily on indigenous issues must extrapolate lessons and techniques designed for other systems. The pilot judgment mechanisms are designed to address many of the same concerns facing the Commission,⁸² namely finding solutions to widespread human rights violations in the midst of a growing backlog within a structure outfitted with an ineffective implementation system. Therefore, lessons drawn from the ECHR's pilot judgment program would function as the legal framework from which to craft settlement issues in the IAS.⁸³

80. For most of the past decade, the rate of settlement has been near twelve percent. Eur. Ct. H.R., *Some Facts and Figures: 1959-2009*, 3, 14-15 (2009), available at www.echr.coe.int.

Only with the added influence of Russia upon the court and its refusal to enter into any settlement negotiations has that number steadily decreased to about 4%. Eur. Ct. H.R., *Survey of Activities: 2007*, 1, 59 (Strasbourg 2008).

81. See *Rules of Court*, *supra* note 63, at Rules 33, 43, 54A, and 62. These rules encourage settlement by keeping proceedings private, providing enforcement mechanisms through the Committee of Ministers, and allowing the Court to condition the hearing of the case only after an attempt towards friendly settlement.

82. Costas Paraskeva, *Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights*, http://www.nottingham.ac.uk/shared/shared_hrlcpub/Paraskeva.pdf (highlighting various benefits of the Pilot Judgment system, including the general principal that it could afford more effective legal remedies domestically).

83. *Id.* According to the regional body conducting the preliminary research on the pilot programs, Article 46 of the European Convention of Human Rights grants

As a consolidation tool, the primary benefit of pilot judgments is the ability to use the pilot decision and apply its redress to the all other similar claims.⁸⁴ Guided by principles of equal protection, an effective pilot judgment could provide governments with a model that quells fear of ongoing, endless litigation surrounding indigenous claims.⁸⁵ Dealing with the problem at hand the first time in a measured, effective, and fair way would help guide policy for lawmakers and temper concerns over future conflicts.

In terms of the actual mechanism in which the indigenous pilot judgment program would fit, the IAS already has in place a structural body to stand as the model. Currently, before a claim even reaches the adjudicative portion of the IACHR, the working group on admission criteria evaluates the admissibility of each claim.⁸⁶ Either by adding duties to this specific group, or creating a new working group, the foundational mechanism for a settlement procedure should be able to funnel all possible reparations settlements into a special process before they enter the IACHR general pool. This new working group should be comprised of independent experts and at least one adjudicative official from a neutral country. The specialists must have considerable transitional justice background with a deep knowledge of Latin American political realities and the various principles and standards of settlements. This team will become a third party arbitrator that seeks the best result for both parties in dispute, independent of any political gain.

The situation facing Paraguayan indigenous groups, while not unique to indigenous claims, provides a template for this working group. After their long legal battle within the country and through the IAS, the Yaky Axa expected to finally attain justice when a favorable judgment was secured from the court, buttressed by presidential support. However, even with presidential support, justice has been stalled, and is frustrating the outcome of the long path the claimants traveled through

such authority. By analogy to Article 48.1.f in the Inter-American Convention, any modified pilot-judgment system geared towards indigenous settlements should have the same legal legitimacy.

84. See generally EUR. CT. H.R., *The Pilot-Judgment Procedure*, *supra* note 68.

85. *Id.*

86. See *Rules of Procedure*, *supra* note 25, at art. 35 (mandating that a working group shall meet prior to each regular session in order to study the admissibility of petitions and make recommendations to the plenary of the Commission).

the courts.⁸⁷

With a pilot judgment program or any other specialized settlement mechanism in place, the Yakye Axa could have involved all the State stakeholders in the process earlier so as to increase the effectiveness of implementation. With a trained working group advising and facilitating a settlement between the claimants, and with government stakeholders generally sympathetic to the claimants,⁸⁸ the Yakye Axa may have avoided the domestic struggles that ensued post-judgment.⁸⁹

Although some may believe the settlement process is as adversarial as litigation (or even more so), the threat of creating a precedent that other indigenous claimants can take advantage of may convince States that a settlement would offer a better outcome than the possible negative political and international fallout. States would therefore be more mindful of the long-term planning of solutions so as to avoid a situation in which one judgment in which they refuse to engage creates a flood of claims they cannot handle.⁹⁰ Furthermore, in the pilot judgment settlement process, the predictability afforded by the technique would give the key State party stakeholders the time and information needed to garner support for the settlement

87. See generally Díaz, *supra* note 52.

88. Although President Fernando Lugo (the first President to be elected from a different political party in over sixty years) assumed power well after the claim was under review in 2008, the flexibility of the Court's procedural mechanism that allows transferring of cases to the settlement procedures at any point may have accommodated this significant change in the political context. See generally Alexi Barrionuevo, *Ex-Cleric Wins Paraguay Presidency, Ending a Party's 62-Year Rule*, N.Y. TIMES, Apr. 21, 2008, at A7.

89. President Lugo's willingness to adhere to the judgments in the Yakye Axa case by asking for Congress to expropriate the lands necessary for reparations reveals the willingness, if not the political capital, of some Latin American governments to be open to settlements. If he had been consulted and designated a stakeholder in a settlement proceeding rather than as the complying party on the losing side of an adversarial judgment, he could have set clear expectations, time-frames, and courses of action for how to fulfill a settlement agreement. As an architect of a reparations program, the current challenges of enforcement through legislative channels may have been averted. See Andres Gaudin, *Paraguay: Embattled President Lugo Gets Help from Neighbor Brazil*, NOTISUR - SOUTH AMERICAN POLITICAL AND ECONOMIC AFFAIRS (July 31, 2009), <http://www.thefreelibrary.com/PARAGUAY:+EMBATTLED+PRESIDENT+LUGO+GETS+HELP+FROM+NEIGHBOR+BRAZIL.-a0204688078> (detailing the President's commitment to indigenous issues even in the face of current political problems).

90. See EUR. CT. H.R., *The Pilot-Judgment Procedure*, *supra* note 68 (explaining how Poland improved its domestic remedies to the claims before the Pilot judgment was handed down so as to have more control over the ultimate remedy).

domestically.⁹¹

While the argument for a more streamlined and effective settlement system within the IACHR may depend partly on other logistical considerations, convincing stakeholders that one element of the system should focus solely on indigenous reparations is not simple. For all of the possible benefits stated above, the current system has not changed fundamentally because current incentives for keeping the status quo are too great for both parties.⁹²

From the State perspective, many of those with reparation programs already in place may point to the inadequacies of such programs as reason to fear further commitment to them.⁹³ Even States with relatively successful programs may be reluctant to give up governmental control over them, which often allows lawmakers to find ways to limit or lessen the influence of such programs.⁹⁴

From the claimant's side, the idea of settlement may run counter to basic notions of justice.⁹⁵ Receiving a judgment from the Court is not always the main goal of taking a case through the Inter-American System. Oftentimes the symbolic action of holding States accountable in an adjudicatory setting helps shift the balance of power towards claimants. This symbolic judgment may not be as strong with a settlement agreement.⁹⁶ Therefore, the IAS must take into account such considerations and begin laying the groundwork for implementation of a settlement mechanism by changing the culture of settlement and convincing stakeholders that such a mechanism is necessary.

91. See Costas Paraskeva, *Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights*, 3 HUM. RTS. L. COMMENT. (2007), http://www.nottingham.ac.uk/shared/hared_hrlcpub/Paraskeva.pdf (highlighting various benefits of the Pilot Judgment system, including the general principal that it could afford more effective legal remedies domestically).

92. See Susan H. Shin, *Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations*, 16 N.Y. INT'L L. REV. 43, 74–6 (highlighting the inherent flaws of the Inter-American settlement system).

93. See *Id.*

94. See *Id.*

95. See *Id.*

96. See *Id.*

C. CREATING A CULTURE OF SETTLEMENT

In changing the culture of settlements, the IAS must do more to encourage and facilitate settlement use. Currently, the IACHR can only encourage friendly settlements by “plac[ing] itself at the disposal of the parties concerned.”⁹⁷ Although amending the American Convention to change this language and give the IACHR the authority to order mandatory settlement procedures is virtually a political impossibility,⁹⁸ the IACHR should funnel more cases towards settlement and provide established mechanisms that clearly show each party the benefits of settling early. Currently, many view the settlement system as a barrier to reaching a finalized IAS ruling on the merits of the claim.⁹⁹ Settlements may lack the comprehensive results of a full domestic reparations system.¹⁰⁰ This may make potential parties skeptical of the approach and less willing to invest resources into a settlement process. The concern is especially strong for indigenous claimants, who may feel from years of previous failures and unequal bargaining that attaining justice from the State party in any context will be difficult.¹⁰¹ If indigenous claimants knew, however, that filing a claim with the IACHR would give them an opportunity to enter right away into a reparations settlements where they can partially dictate the terms (assuming their claim met

97. *Rules of Procedure*, *supra* note 25, at art. 40.1.

98. While the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights* and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty* were adopted by fourteen and eleven nations respectively, the domestic political dynamics involved in developing a separate protocol for settlements, especially when guidelines are already in place, remains an unrealistic and ultimately impractical endeavor. See generally Nadia Ezzelarab and Brian Tittmore, *Round Table Discusses U.S. Ratification of Inter-American Convention on Human Rights*, THE HUMAN RIGHTS BRIEF (Nov. 20, 2009), http://www.wcl.american.edu/hrbrief/v2i1/ia_conv21.htm (last visited Nov. 20, 2009) (highlighting the difficulty of ratification from the perspective of the United States domestic laws and policy).

99. See, e.g., Shin, *supra* note 90, at 68, 74 (stating “The Commission’s recommendation for the Court action is severely limited by the ‘friendly settlement; requirement.” and “One inherent defect of the entwined Commission/Court system is the heavy emphasis on utilizing the ‘friendly settlement’ system.”).

100. For a comprehensive explanation of types of reparations for victims, see INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE AND HUMAN RIGHTS ASSOCIATION, DESIGN PARAMETERS FOR A REPARATIONS PROGRAM IN PERU 16–19 (2002), available at <http://www.ictj.org/static/Americas/Peru/Parameters.eng.pdf>.

101. See generally Standaert, *supra* note 26, at 530–31 (noting that in the context of domestic violence, equalizing the power of the parties at the bargaining table can be difficult).

established guidelines of the mechanism), they may be more amenable to filing claims and settling before a judgment by the IACHR or IACtHR.¹⁰²

The onus is then on the facilitator to fashion a settlement regime that educates and guides the Parties so as to highlight the efficiencies and advantages of solving the claim outside of the traditional adversarial system.¹⁰³ This shift in emphasis would allow the Commission to funnel cases into genuine settlement processes, and give the IACHR more authority to assert pressure on parties.

The current changes of the friendly settlement procedures for the IACHR reveals the Commission's influence in forcing settlement may be stronger than in the past. Therefore, in the short term, the IAS can take intermediate steps towards these goals even without a fully developed settlement mechanism in place. Members of the IACHR should suggest that parties engage in settlement before admissibility hearings. Furthermore, members should attend trainings in settlements facilitation so as to better understand the best practices of international friendly settlement.¹⁰⁴ When the IAS eventually implements full mechanisms, such as the Indigenous Reparations process proposed in this note, the culture of the IACHR and IACtHR will be more agreeable to its implementation.

D. CONVINCING STAKEHOLDERS TO USE THE INDIGENOUS REPARATIONS PROCESS AS A SETTLEMENT TOOL

When the IAS eventually implements changes to the settlement process, profound questions will remain about the appropriateness of using settlement mechanisms for indigenous claims. The IAS has already developed a fairly robust jurisprudence in the area of indigenous rights, and the goal of an indigenous reparations settlement mechanism is to continue this process. Some worry that the Inter American System's current recognition of indigenous property rights will soon fade,

102. *See generally id.*, at 536–37 (arguing that settlements provide victims an opportunity to craft their own vision of justice).

103. *Compare* Explanatory Report, *supra* note 66 (explaining that Protocol 14 is designed to shift settlement power back to the facilitators) *with Rules of Procedure*, *supra* note 25, at art. 4.2 (explaining that parties hold primary settlement power).

104. Examples include sending members of the IAS to conferences hosted by the ABA Section on Dispute Resolution and the U.S. Federal Judicial Center, bodies dedicated to the advancement of friendly settlement techniques.

which makes the task all the more difficult.¹⁰⁵

However, the creation of an effective settlement mechanism designed specifically to address indigenous reparations would flow from the IAS's main strength: its flexibility and ingenuity in developing varied and efficient solutions to historical and ongoing human rights abuses.¹⁰⁶ Furthermore, without sudden changes in the speed of State acquiescence to court mandated reparations,¹⁰⁷ the IAS must continually find ways to assert its influence creatively.

Even when cases survive the cumbersome process and obtain a favorable judgment, implementation remains difficult. Using a settlement mechanism to bring a State party on board at an earlier stage in the proceedings may facilitate higher rates of compliance and therefore provide effective remedies.¹⁰⁸ The Paraguayan cases reveal this reality for indigenous advocates. Even though the *Yakye Axa* successfully won a favorable judgment from the Court, justice has not been forthcoming. Since the current standstill in the legislative process signals an indefinite delay in securing the court-mandated judgment, claimants have a better chance at working within a settlement mechanism that encourages all parties to the table faster and provides them with the possibility of more timely results.¹⁰⁹

The existence of these problems is pushing the Inter-American System to look towards settlement solutions that both draw upon and go beyond previously established

105. See, e.g., Shin, *supra* note 90, at 66-72 (arguing that the court's recent interpretation of the property consideration of non-active usage signals a reluctance to extend Indigenous property rights).

106. See Carozza, *supra* note 8 (arguing that the Commission's strength is in its multiple methods of addressing human rights issues, including judicial proceedings, country reports and visits, special rapportourships, and educational initiatives).

107. See Shin, *supra* note 90, at 66 (arguing that States generally refuse to acquiesce easily).

108. See Armstrong Wiggins, Director of Indian Law Resource Ctr. Washington D.C. Office, Introductory Statement at Policy Roundtable: Tomorrow's Human Rights: Addressing the Challenges Ahead (Nov. 11, 2009) (transcript available at <http://www.indianlaw.org/node/517>) (recognizing that apart from a universal declaration on the rights of indigenous peoples, there "is a consistent regional body of law developed by both the Commission and the Court that is supposed to expedite the negotiation, settlement, and ultimately the adversarial judicial process...[but that] states ignore such a body of law on the rights of indigenous peoples" throughout the negotiation process and even after unfavorable judgments).

109. See generally AMNESTY, *supra* note 10, at 11.

jurisprudence.¹¹⁰ Unless indigenous advocates are willing to develop solutions to these overarching problems, the backlog in the IAS and the lack of enforcement will continue.¹¹¹ The current settlement process is underdeveloped and underutilized.¹¹² Therefore, it is most prudent for indigenous advocates, and human rights advocates in general, to push for a specialized Indigenous Reparations settlement mechanism.

IV. CONCLUSION

As the Inter-American Commission continues to establish its legitimacy as a fundamental protector of human rights for indigenous populations in the American States, the current challenges of the increasing backlog of claims, limited resources, and contentious cases will continue to demand creative solutions. Already a fixture of the European system, progressive-friendly settlement procedures and mechanisms provide one such solution to these problems. The IAS must develop its own versions of these settlement tools to maximize their appeal to both indigenous claimants and State parties. Instead of resisting such mechanisms for fear that they will not fully secure human rights, indigenous claimants should view them as an opportunity to expand current reparations models that have provided an infrastructure, if not full remedies, to other reparations issues. Endowed with predictive and consolidative tools, such as pilot judgments, States should find incentives from participating in an indigenous settlement regime that may ultimately condensing the claims against it and bolster its human rights record.

110. See Wiggins, *supra* note 108 (arguing that “[T]he Commission should not stay silent before such an attitude. On the contrary, it should engage in the negotiation process by stating the governing principle of law on the issue under negotiation and by promoting the respect of such a principle by all parties.”).

111. *Id.* (noting that while hearings held before the Commission on the growing development into indigenous lands have increased in frequency, the burgeoning caseload of the Commission prevents them from being utilized for state-specific solutions).

112. Since the year 2000, only a total of 8 cases in any given year were decided via settlement agreement. See generally Inter-American Commission of Human Rights, Annual Reports 2000–2008, available at <http://www.cidh.oas.org/annual.eng.htm>.